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REPORTS
OF
Cases Heard and Determined
BY THE
SUPREME COURT
OF
SOUTH CAROLINA

VOLUME XCVIII.

**CONTAINING CASES OF NOVEMBER TERM, 1913, AND APRIL
TERM, 1914.**

W. H. TOWNSEND,
SUPREME COURT REPORTER.

Columbia, S. C.
The R. L. Bryan Company, Publishers.
1914.

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JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME.

JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.

HON. EUGENE B. GARY.

ASSOCIATE JUSTICES.

HON. D. E. HYDRICK.

HON. R. C. WATTS.

HON. T. B. FRASER.

HON. G. W. GAGE.

CIRCUIT JUDGES.

FIRST CIRCUIT—HON. I. W. BOWMAN.¹

SECOND CIRCUIT—HON. H. F. RICE.

THIRD CIRCUIT—HON. JOHN S. WILSON.

FOURTH CIRCUIT—HON. T. H. SPAIN.

FIFTH CIRCUIT—HON. ERNEST GARY.

SIXTH CIRCUIT—HON. ERNEST MOORE.

SEVENTH CIRCUIT—HON. T. S. SEASE.

EIGHTH CIRCUIT—HON. FRANK B. GARY.

NINTH CIRCUIT—HON. R. WITHERS MEMMINGER.

TENTH CIRCUIT—HON. GEORGE E. PRINCE.

ELEVENTH CIRCUIT—HON. J. W. DEVORE.

TWELFTH CIRCUIT—HON. S. W. G. SHIPP.

THIRTEENTH CIRCUIT—HON. T. J. MAULDIN.

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HON. THOS. H. PEEPLES.

ASSISTANT ATTORNEY GENERAL.

FRED. H. DOMINICK.

SOLICITORS.

1st Circuit—P. T. HILDEBRAND.

8th Circuit—R. A. COOPER.

2d Circuit—R. L. GUNTER.

9th Circuit—JOHN H. PEURIFOY.

3d Circuit—PHILIP H. STOLL.

10th Circuit—KURTZ P. SMITH.²

4th Circuit—J. M. SPEARS.

11th Circuit—G. B. TIMMERMAN.

5th Circuit—W. HAMPTON COBB.

12th Circuit—L. B. SINGLETON.

6th Circuit—J. K. HENRY.

13th Circuit—PROCTOR A. BONHAM.

7th Circuit—A. E. HILL.

CLERK OF THE SUPREME COURT.

ULYSSES R. BROOKS.

¹Printed by mistake in Volumes 95, 96 and 97 as I. B., instead of I. W. Bowman.

Acknowledgment.

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W. H. TOWNSEND,
Supreme Court Reporter.

Columbia, S. C., October 26, 1914.

Cases Reported in this Volume.

Addison v. Beach, 82 S. E. 428.....	215
Agurs, Drennan v., 82 S. E. 622.....	391
Andrews v. A. C. L. R. R. Co., 82 S. E. 403.....	212
Atlanta & C. A. L. R. R. Co., Sturdyvin v., 82 S. E. 275	125
Atlantic C. L. R. R. Co., Andrews v., 82 S. E.....	403, 212
Dix v., 82 S. E. 798.....	492
Matthews v., 82 S. E.....	204
Sauls-Baker Co. v., 82 S. E. 418	300
Wray v., 82 S. E. 412.....	278
Atlantic Coast Lumber Corp., Minshew v., 81 S. E. 1027.....	8
Barnett v. Gottlieb, 82 S. E. 406.....	180
State v., 82 S. E. 795.....	422
Beach v. Addison, 82 S. E. 428.....	215
Beckwith v. Martin, 82 S. E. 414.....	183
Bennett v. So. Ry.—Carolina Division, 79 S. E. 710..	42
Bramlett v. So. Ry. Co., 82 S. E. 501.....	319
Buist, Morris v., 82 S. E. 675.....	415
Burgiss, Gwathney v., 82 S. E. 394.....	152
Camperdown Mills, Paris Mt. Water Co. v., 82 S. E. 417	304
Cannon v. Cox, 82 S. E. 399.....	185
Casello v. Jefferson Hotel Co., 82 S. E. 412.....	222
Carolina Midland Warehouse Co., Bank v., 82 S. E. 405	168
Carolina Rice Co. v. West Point Mill Co., 82 S. E. 679	476
Central National Bank v. Grimes, 82 S. E. 420.....	218
Champion v. Hermitage Cotton Mill Co., 82 S. E. 672.	418
Charleston & W. C. Ry. Co., Jones v., 82 S. E. 415.....	197
Varnville Furniture Co. v., 79 S. E. 700.....	63

Church v. Moody, 82 S. E. 428.....	234
Coleman, Ex parte, 82 S. E. 674.....	420
Coley v. Coley, 81 S. E. 518.....	97
Columbia Hospital, Lindler v., 81 S. E. 512.....	25
Newberry & Laurens R. R. Co., DuPre v., 79 S. E. 310.....	468
Commerce Trust Co. v. Grimes, 82 S. E. 420.....	220
Counts, Lummus Cotton Gin Co. v., 82 S. E. 391.....	136
Cox, Cannon v., 82 S. E. 399.....	185
Crawford v. Masters, 82 S. E. 793.....	458
Rice-Hutchins Balt. Co., 82 S. E. 273....	121
Daly v. Jefferson Hotel Co., 82 S. E. 412.....	222
Dix v. A. C. L. R. R. Co., 82 S. E. 798.....	492
Douglas v. So. Ry. Co., 82 S. E. 439.....	346
Drennan v. Agurs, 82 S. E. 622.....	391
Driggs v. So. Ry. Co., 81 S. E. 431.....	100
DuPre v. C., N. & L. R. R. Co., 79 S. E. 310.....	468
Easterling v. Odom, 82 S. E. 407.....	171
Eberle v. So. Ry. Co., 79 S. E. 792.....	89
Elliott v. Page, 82 S. E. 620.....	400
Felder, Rogers v., 82 S. E. 436.....	178
First Natl. Bank v. Ca. Warehouse Co., 82 S. E. 405..	168
Gottlieb, Barnett v., 82 S. E. 406.....	180
Greer v. Keaton, 82 S. E. 424.....	192
Gregory-Conder Mule Co. v. Roddey, 78 S. E. 876....	347
Griffin, State v., 82 S. E. 254.....	105
Grimes, Central Natl. Bank v., 82 S. E. 420.....	218
Commerce Trust Co. v., 82 S. E. 420.....	220
Gwathney v. Burgiss, 82 S. E. 394.....	152
Hambright v. So. Ry. Co., 82 S. E. 416.....	219
Hamilton, Mitchell v., 82 S. E. 425.....	289
Hayes v. S. A. L. Ry., 81 S. E. 1102.....	6
Henderson v. Spartanburg Ry. etc. Co., 82 S. E. 404..	206
Hermitage Cotton Mills Co., Champion v., 82 S. E. 672	418
Holman, Ex parte, 81 S. E. 518.....	97

Jefferson Hotel Co., Casello v., 82 S. E. 412.....	222
Daly v., 82 S. E. 412.....	222
Standen v., 82 S. E. 412.....	222
Jones v. C. & W. C. Ry. Co., 82 S. E. 415.....	197
Keaton, Greer v., 82 S. E. 424.....	192
Keenan v. Matthews, 82 S. E. 431.....	226
King, Sullivan v., 82 S. E. 408.....	314
Kirven v. Wilds, 82 S. E. 673.....	463
Knox, State v., 82 S. E. 278.....	114
Lemacks, State v., 82 S. E. 879.....	498
Lightsey, Planters Oil Co. v., 81 S. E. 1102.....	3
Lindler v. Columbia Hospital, 81 S. E. 512.....	25
Lott v. So. Ry. Co., 82 S. E. 795.....	170
Lummus Gin Co. v. Counts, 82 S. E. 391.....	136
McCoy, State v., 82 S. E. 280.....	133
McKeown v. So. Ry. Co., 82 S. E. 437.....	338
Martin, Beckwith v., 82 S. E. 414.....	183
Masters, Crawford v., 82 S. E. 793.....	458
Matthews v. A. C. L. R. R. Co., 82 S. E.....	204
Keenan v., 82 S. E. 431.....	226
Maybank & Co. v. Rogers, 82 S. E. 422.....	279
Minshew v. A. C. Lumber Corp., 81 S. E. 1027.....	8
Mitchell v. Hamilton, 82 S. E. 425.....	289
State v., 82 S. E. 676.....	474
Mitchum v. Shaw, 82 S. E. 401.....	175
Moody, Church v., 82 S. E. 428.....	234
Morris v. Buist, 82 S. E. 675.....	415
North Carolina Home Ins. Co., Padgett v., 82 S. E.	
408	244
Nunnamaker v. Smith's, 82 S. E. 675.....	466
Odom, Easterling v., 82 S. E. 407.....	171
Padgett v. N. C. Home Ins. Co., 82 S. E. 408.....	244
Page, Elliott v., 82 S. E. 620.....	400

Paris Mt. Water Co. v. Camperdown Mills Co., 82 S. E. 417.....	304
Patterson v. Walker, 82 S. E. 432.....	286
Planters Oil Co. v. Lightsey, 81 S. E. 1102.....	3
Rice, In re Estate of, 82 S. E. 674.....	420
Rice-Hutchins Balt. Co., Crawford v., 82 S. E. 273...	121
Richardson, State v., 82 S. E. 353.....	147
Riley, State v., 82 S. E. 621.....	386
Roddey, Gregory-Conder Mule Co. v., 78 S. E. 876...	347
Rodgers, Maybank & Co. v., 82 S. E. 422.....	279
Rogers v. Felder, 82 S. E. 436.....	178
Sauls-Baker Co. v. A. C. L. R. R. Co., 82 S. E. 418...	300
Seaboard Air Line Railway, Haynes v., 81 S. E. 1102	6
Thornton v., 82 S. E. 433	348
Seacoast Timber Co., Thomas v., 82 S. E. 274.....	111
Shaw, Mitchum v., 82 S. E. 401.....	175
Smalls, State v., 82 S. E. 421.....	297
Southern Railway—Carolina Div., Bennett v., 79 S. E. 710	42
Southern Ry. Co., Bramlett v., 82 S. E. 501.....	319
Douglas v., 82 S. E. 439.....	346
Driggs v., 81 S. E. 431.....	100
Eberle v., 79 S. E. 792.....	89
Hambright v., 82 S. E. 416.....	219
Lott v., 82 S. E. 795.....	170
McKeown v., 82 S. E. 437.....	338
Wilson v., 82 S. E. 431.....	209
Smith's, Nunnemaker v., 82 S. E. 675.....	466
Spartan Mills, Thornton v., 82 S. E. 414.....	262
Spartanburg etc. Ry. Co., Henderson v., 82 S. E. 404..	206
Taylor v., 82 S. E. 404.....	206
Standen v. Jefferson Hotel Co., 82 S. E. 412.....	222
State v. Barnett, 82 S. E. 795.....	422
Griffin, 82 S. E. 254.....	105
Knox, 82 S. E. 278.....	114

TABLE OF CASES.

IX

State v. Lemacks, 82 S. E. 879.....	498
McCoy, 82 S. E. 280.....	133
Mitchell, 82 S. E. 676.....	474
Richardson, 82 S. E. 353.....	147
Riley, 82 S. E. 621.....	386
Smalls, 82 S. E. 421.....	297
Winter, 82 S. E. 419.....	294
Sturdyvin v. Atlanta & C. A. L. R. R. Co., 82 S. E. 275	125
Sullivan v. King, 82 S. E. 408.....	314
 Taylor v. Spartanburg etc. Ry. Co., 82 S. E. 404.....	206
Thesmar v. Union Buffalo Mills Co., 81 S. E. 181....	1
Thomas, Seacoast Timber Co. v., 82 S. E. 274.....	111
Thornton v. Seaboard A. L. Ry., 82 S. E. 433.....	348
Spartan Mills, 82 S. E. 414.....	262
Tucker v. Weathersbee, 82 S. E. 638.....	402
Twiggs v. Williams, 82 S. E. 676.....	431
 U. S. Health & Accident Ins. Co., Wylie v., 82 S. E.	
402	278
Union Buffalo Mills Co., Thesmar v., 81 S. E. 181....	1
 Varnville Furniture Co. v. C. & W. C. Ry. Co.....	63
 Walker, Patterson v., 82 S. E. 432.....	286
Weathersbee, Tucker v., 82 S. E. 638.....	402
West Point Mills Co., Carolina Rice Co. v., 82 S. E.	
679	476
Wilds, Kirven v., 82 S. E. 673.....	463
Williams, In re Estate of, 82 S. E. 402.....	211
Twiggs v., 82 S. E. 676.....	431
Wilson v. So. Ry. Co., 82 S. E. 431.....	209
Wray v. A. C. L. R. R. Co., 82 S. E. 412.....	278
Wylie v. U. S. Health & Accident Ins. Co., 82 S. E.	
402	273

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Supreme Court of South Carolina.

**Justices of the Supreme Court During the Period Comprised in
this Volume.**

HON. EUGENE B. GARY, CHIEF JUSTICE.
HON. D. E. HYDRICK, ASSOCIATE JUSTICE.
HON. R. C. WATTS, ASSOCIATE JUSTICE.
HON. T. B. FRASER, ASSOCIATE JUSTICE.
HON. GEO. W. GAGE, ASSOCIATE JUSTICE.

8766

UNION BUFFALO MILLS CO. v. THESMAR.

(81 S. E. 181.)

ATTACHMENT. MOTION TO DISSOLVE. RIGHT OF DEFENDANT.

Where plaintiff, in an action to recover a debt from defendant, attaches money in the hands of a trust company, defendant, claiming that the money belonged to a bank, has no standing to move to dissolve the attachment.

Before SEASE, J., Union, September, 1913. Appeal dismissed.

Action by the Union Buffalo Mills Company against Alex. Thesmar, doing business under the firm name of Alexander Thesmar & Co. From an order refusing to set aside an attachment, defendant appeals.

Messrs. McCullough, Martin & Blythe, for appellant, cite: *Defendant may seek to have attachment set aside, for benefit of the bank*: 93 S. C. 41; *which owns the funds attached*: 89 Ga. 108; 14 S. E. 891; 91 Ga. 307; 18 S. E. 188; 93 Ga. 484; 21 S. E. 50; 122 Ga. 67; 49 S. E. 816; 112 Ga. 814; 38 S. E. 105; 87 Ga. 435; 13 S. E. 586; 136 Ga. 372; 71 S. E. 660; 55 N. Y. Supp. 561; 102 N. W. 978; 139 Mich. 392; 70 L. R. A. 615; 30 W. Va. 518; 8 L. R. A. 101; 93 S. C. 30, 41. *Intervention by the bank does not prevent defendant from making this motion*: 72 S. C. 450; 93 S. C. 30; 53 S. C. 110. *Affidavit insufficient*: 93 S. C. 105, 106.

Messrs. J. Ashby Sawyer and William Elliott, for respondent, cite: *Cases distinguished*: 72 S. C. 450; 93 S. C. 30; 53 S. C. 110; 30 S. E. 830. *Ownership of draft*: 136 Ga. 372; 71 S. E. 660; 72 S. C. 462.

March 24, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

This is an attachment proceeding. The plaintiff claims that the defendant owes it a debt, to wit, \$1,274.78; that the defendant is a nonresident of this State, and that he has property in this State, to wit, \$2,973.80 in the hands of Nicholson Bank & Trust Company, of Union, S. C. The plaintiff took out attachment proceedings, and attached \$1,500 of this money. The National Bank of Savannah served a formal notice that it is the owner of this fund. The "defendant gave notice of a motion before his Honor, Judge T. S. Sease, to dissolve the attachment." The defendant's motion was based upon the claim that the National Bank of Savannah was the owner of the fund and not the defendant. Judge Sease refused to set aside the attachment, and from his order the defendant appealed upon three exceptions. Neither of these exceptions legitimately arise in this case. The initial question is, Can a defendant,

REF.]

April Term, 1914.

who claims neither possession nor title, move to set aside an attachment? He cannot. *Metts v. P. & A. Life Insurance Co.*, 17 S. C. 122. Mr. Drake, the highest authority on attachment proceedings, says that "the defendant debtor cannot move to dismiss an attachment on the ground that the property attached did not belong to him." The question is between the attaching plaintiff and the intervening claimant.

The appeal is dismissed.

MR. JUSTICE GAGE did not sit in in this case.

8857

PLANTERS OIL CO. v. LIGHTSEY.

(81 S. E. 1102.)

SALES. DELIVERY. PERFORMANCE OF CONTRACT. NEW TRIALS. APPEAL AND ERROR.

1. Under a contract to sell certain goods at a price f. o. b. a certain point, to be shipped to purchaser at another point named, a delivery to a carrier on a bill of lading to shipper's own order notify purchaser at place named for delivery, freight charges to be there collected; and forwarding such bill of lading attached to draft for contract price less freight charges to f. o. b. point, to be delivered to purchaser on his paying the draft at bank nearest his place of business, at a point other than that of destination, shipper refusing to release them until such draft was paid, is not a delivery of the goods to the purchaser nor a performance of the contract by the seller, where the goods never reached destination because the freight charges thereon were not prepaid.
2. On appeal by plaintiff from order granting a new trial, no error being found in the order, judgment absolute will be rendered against him, and the action dismissed.

Before SPAIN, J., Hampton, February, 1913. Affirmed.

Action by Planters Oil Company against W. F. Lightsey. From order granting a new trial, plaintiff appeals. The facts are stated in the opinion.

Mr. J. W. Vincent, for appellant, cites: *Cash sale, contemplated*: Cent. Dig. Sales, par. 230; Decennial Digest Sales 82 (2); 34 N. J. L. 408. *Delivery to carrier was delivery to vendee*: Cent. Digest Sales 377; Dec. Dig. Sales 161; 42 Ala. 199; 54 Atl. 634; 62 L. R. A. 795; 57 Ga. 50. *Appeal lies*: 75 S. E. 553.

Mr. Geo. Warren, for respondent, cites: *Appeal from order granting new trial*: 92 S. C. 361; 88 S. C. 350; 83 S. C. 393; 57 S. C. 138. *No delivery to purchaser*: 81 S. C. 226; 153 Pa. St. 440; 72 S. C. 450; 35 Cyc. 333, 343; 123 Pac. 619; 146 Ala. 513; 123 Pac. 619. *Failure to deliver due to seller's failure to prepay freight*: 35 Cyc. 246. *No notice of resale given purchaser*: 77 S. W. 590.

May 25, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

On January 19, 1911, plaintiff contracted, through a broker, to sell defendant 50 tons of cottonseed meal, which was to be shipped to defendant at Crockettville, S. C. Plaintiff's place of business was at Albany, Ga., and, by the terms of the contract, the meal was sold f. o. b. Savannah, Ga., that is, plaintiff was to pay the freight from Albany to Savannah, and defendant was to pay it from Savannah to Crockettville. On January 28, as soon as plaintiff received shipping instructions, the meal, consisting of two carloads, was shipped on what is known as "an order notify shipment;" that is, it was consigned to the order of the plaintiff at Crockettville, with instructions to notify the defendant. The bill of lading, so made out, with sight draft attached for the agreed price, less the freight charges from Albany to Savannah, was sent to the Bank of Hampton, the nearest bank to defendant's place of business.

Crockettville is what is known as a prepay station,—a station to which freight charges must be prepaid, as the rail-

REP.]

April Term, 1914.

road company has no agent there. Of this fact, plaintiff was ignorant, and the freight charges were not prepaid. When the cars arrived at Hampton, they were sidetracked, and the railroad company notified plaintiff that they would not be forwarded to Crockettville until the freight was paid.

On February 8, plaintiff wrote defendant that it had been so notified, and requested him to pay the draft, get the bill of lading and pay the freight, so that the cars could go forward to destination. Defendant declined to do this, but offered to pay the freight, if plaintiff would release the cars and let them go forward. After some correspondence, extending from February 8 to March 14, in which the parties stated their contentions, and in which the plaintiff insisted that defendant should do as above suggested, and in which defendant finally offered to do so provided plaintiff would reduce the price of the meal \$2 per ton, the market having declined that much, because, pending the delay in the shipment, he had had to buy other meal, the plaintiff, on March 25, sold the meal, through a broker, to a fertilizer company at \$25 per ton, the best price that could be obtained at that time.

Plaintiff then brought this action to recover the difference in the price of the sale to defendant and the resale for his account, together with the brokerage on the resale, as damages for the defendant's alleged breach of the contract. After hearing the evidence, on motion of plaintiff, the Court directed a verdict for the plaintiff for the full amount claimed. But, on motion of defendant for a new trial, the Court held that he had erred in directing the verdict, and passed an order setting it aside and granting a new trial. From this order plaintiff appealed.

From the facts above stated, it is clear that defendant did not breach the contract. He was under no obligation to pay for the meal, until it arrived at Crockettville. As it never arrived there, plaintiff had no cause of action against him.

Plaintiff contends that delivery of the meal to the carrier was delivery to defendant, and that it is not liable therefor for the refusal of the carrier to carry it to destination without prepayment of the freight. But this contention overlooks the fact that the meal was not shipped to defendant, but to plaintiff's own order. In that way, plaintiff retained title to it, and the carrier was its agent. There was, therefore, no error in setting aside the directed verdict.

Subdivision 2 of section 11 of the Code of Procedure provides, that "upon any appeal from an order granting a new trial on a case made, or on exceptions taken, if the

Supreme Court shall determine that no error was

2 committed in granting the new trial, it shall render judgment absolute upon the right of the appellant."

* * * Under this provision of the statute, finding no error in the order appealed from, we must render judgment absolute upon the right of the appellant, which is that the order of the Circuit Court be affirmed and the complaint dismissed.

Affirmed.

MR. JUSTICE GAGE did not sit in this case.

8859

HAYES v. SEABOARD A. L. RY.

(81 S. E. 1102.)

CORPORATIONS. RAILROADS. VENUE.

A foreign corporation owning and operating a line of railroad in this State is a resident of a county in which such railroad is situate, and in which it maintains offices and agents for the transaction of such business; and may, under Code Civil Procedure, sec. 174, be sued in such county jointly with a resident of another county of the State, and it was error to transfer the case to the county where the other defendant resided.

REF.]

April Term, 1914.

Before SPAIN, J., Lexington, February, 1914. Reversed.

Action brought by Rosanna Hayes, as administratrix of Boliver Hayes, against Seaboard Air Line Railway and P. L. Bean, to recover damages for an alleged joint tort. The facts are stated in the opinion.

Messrs. Melton & Sturkie, for appellant, cite: Code Civil Proc. 174; 30 S. C. 296; 79 S. C. 502; 47 S. C. 387; 86 S. C. 324.

Messrs. Lyles & Lyles, for respondent, cite: 87 S. C. 322.

May 27, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

The appeal herein is from an order, transferring this case from Lexington county to Bamberg county, on the ground that the defendant, Seaboard Air Line Railway Company, is a foreign corporation, while the defendant, P. L. Bean, is not a resident of Lexington county, but is a resident of Bamberg county.

The complaint alleges, and it is not denied, that the defendant, Seaboard Air Line Railway Company, is a foreign corporation, doing business as a common carrier and owns a line of railway, running through the county of Lexington, and that it maintains offices and agents in the county of Lexington, for the transaction of its business as a common carrier.

Section 174 of the Code of Civil Procedure, 1912, provides that "if there be more than one defendant, then the action may be tried in any county, in which one or more of the defendants to such action reside, at the time of the commencement of the action."

The case of *Rafeld v. Ry.*, 86 S. C. 324, 68 S. E. 631, shows that the defendant, Seaboard Air Line Railway, was a resident of Lexington county, and that his Honor, the Circuit Judge, therefore, erred in ordering the case to be transferred to Bamberg county.

The presiding Judge based his ruling upon the case of *Barfield v. So. Cotton Oil Co.*, 87 S. C. 322, 69 S. E. 603.

In that case, however, it was not made to appear, that either of the defendants was a resident of Lexington county, from which the case was transferred to Richland county, where both defendants resided.

Reversed.

REPORTER'S NOTE: See Const. 1895, art. IX, sec. 6, providing for domestication of foreign corporations operating railroads in this State, and cases cited thereunder.

8826

MINSHAW v. ATLANTIC COAST LUMBER CORPORATION.

(81 S. E. 1027.)

LOGS AND LUMBER. SALES OF STANDING TIMBER. TIME FOR REMOVAL. EVIDENCE. APPEAL AND ERROR. ASSIGNMENT OF PURCHASER'S RIGHTS. TERMINATION OR FORFEITURE OF RIGHTS.

1. In a suit for the forfeiture of a conveyance of standing timber on the ground that the purchaser and his assignee had not commenced to cut and remove the timber within a reasonable time, evidence that the purchaser and the assignee had consulted an attorney before the execution of the conveyance as to the legal effect thereof was inadmissible.
2. A party complaining on appeal of the findings of fact, on the ground of the insufficiency of the testimony to support them, must show by a preponderance of the testimony that the findings are erroneous.
3. Where a conveyance of standing timber was silent as to when the purchaser should commence to cut and remove the timber, the cutting and removal must be within a reasonable time.

REF.]

April Term, 1914.

4. An assignee of a purchaser of standing timber is chargeable with knowledge of the proper legal construction of the conveyance silent as to time when the cutting and removal should commence.
5. Where a forfeiture of a conveyance of standing timber was sought on the ground that the purchaser and his assignee had not begun to cut and remove the timber within a reasonable time, evidence that the grantor at the time of the execution of the conveyance was led to believe by the purchaser that a mill would be erected in the near future near the timber sold was admissible as bearing on the question of reasonable time within which the timber should be cut and removed.
6. The Court on appeal will presume that the trial Judge was influenced in his findings of fact by competent testimony relevant to the issues and uninfluenced by incompetent evidence.
7. A conveyance of standing timber silent as to the time when the purchaser should begin to cut and remove the timber, but providing that the time limit should be five years from the beginning of the cutting and removal, which might be extended on the payment by the purchaser of interest on the purchase price, calls for the beginning of the cutting and removal of the timber within a reasonable time, and, where the purchaser and his assignee failed for twelve years to begin to cut and remove the timber and did not offer to pay the interest on the price, a forfeiture of the conveyance was warranted.
8. A vendor of standing timber may sue for a forfeiture of the conveyance based on the failure of the purchaser and his assignee to begin to cut and remove timber within a reasonable time, without first giving notice to the purchaser or assignee to begin to remove the timber pursuant to the conveyance silent as to the time when the cutting and removal should begin.
9. A contract for the sale of standing timber silent as to the time when the purchaser should begin to cut and remove the timber, but stipulating that the time limit should be five years from the time the purchaser begins the cutting and removal, subject to extensions from year to year on the payment by the purchaser of interest on the price, is not an absolute conveyance in fee, but is in the nature of a lease, and the purchaser failing to remove the timber within a reasonable time has no interest therein.

Before DEVORE, J., Marion, August, 1912. Affirmed.

Action by O. G. Minshew against the Atlantic Coast Lumber Corporation. From a decree and judgment for plaintiff, defendant appeals.

The facts are stated in the Circuit decree rendered by Judge DeVore, as follows:

"By reference to the complaint it will be seen that the purpose of the action is to have the deed made by W. A. Wall to R. L. Montague (through whom the defendant claims the title to the timber on the land described) declared null and void, and to have the said deed canceled, for the reason that the defendant failed to begin cutting and removing the timber from said lands within a reasonable time from the date of said deed. The answer of defendant is, first, a general denial; second, an affirmative defense, which consists in alleging the difficulties and expenses, the enormous and gigantic sawmill plant which was necessary to be built in order to manufacture all of the timber holdings of the defendant; the fact that R. L. Montague, the purchaser of this timber, had no sawmill or means of transportation for the timber, etc.

"At the hearing of the case I let in all testimony offered by either party subject to all objections noted on the record, to be passed upon when I wrote the decision. It will appear from the pleadings in the case there is no question of inadequacy of consideration for the timber, no question of fraud or misrepresentation, no question of any other contract, other than the one involved here, to wit, the deed or agreement from W. A. Wall to R. L. Montague. I therefore sustain all objections to any testimony which proves or tends to prove a different contract to the one involved here, or any testimony which changes or tends to change or vary or add to the contract involved, or any testimony which proves or tends to prove fraud, misrepresentation, or inadequacy of consideration; also, all testimony as to getting legal advice, as I do not regard it competent. The testimony is very voluminous. Yet I have read it with pains and care and great interest on account of the importance of the issue involved, and have undertaken to digest it, and give what weight it is entitled to on the question before me,

REP.]

April Term, 1914.

to wit, what is a reasonable time in which the defendant should begin cutting and removing the timber from the land described in the complaint by reason of the terms of the deed from Wall to Montague, both the plaintiff and the defendant claiming from W. A. Wall. As best I can, and in as fair and just a manner as I am able to do, keeping in mind all the while what is right, just, equitable, and proper with reference to the rights of both plaintiff and defendant, I find as a matter of fact from the competent testimony in the case that the plaintiff is the fee-simple owner of the tract of land described in the complaint (see plaintiff's deed from Wall, dated December 4, 1911). I find that on the 24th December, 1898, R. L. Montague became the owner of the timber on this land (see deed or agreement between Wall and Montague). I find that by and through other deeds the defendant succeeded to the rights and interest that Montague had in the timber on this tract of land. I find that R. L. Montague was quite a timber expert at the time he purchased from Wall. I find that Wall at that time knew very little about the timber business. I find at the time of the Wall deed to Montague that Montague had purchased timber in the counties of Horry, Florence, Williamsburg, Georgetown, Berkeley, and Charleston, besides that in Marion. I find that Wall, at the time of this timber contract, knew of no timber holdings or timber contracts by Montague, except in Marion county, and even this only by hearsay (see his testimony). This finding of fact is based on testimony objected to, but I think it competent; that is to say, I find from the testimony that, at the time of the execution of the deed by Wall to Montague, said Montague told him they would put a sawmill somewhere near his timber, and also that one Freeman told him the same thing in substance. This evidence I think is competent on reasonable time, as I shall show as a matter of law. I find that the date of the Wall deed to Montague is 24th of December, 1898. I find that defendant, who claims through the Mon-

tague deed, entered upon the land in question to exercise its right under said deed, and cut about 20 or 30 trees. For what purpose the testimony is not clear, but it seems it was for the purpose of preparing to cut and remove the timber therefrom. This was done on or about the 2d of January, 1912. As to the facts set forth in the answer as an affirmative defense, or the evidence introduced to sustain it, I do not think as a matter of law it should have much weight on the question of reasonable time involved here, unless knowledge of those facts be brought home to W. A. Wall at the time or before he made his deed to Montague, and I find as a matter of fact based on the evidence in this case W. A. Wall was ignorant of those facts at that time, except that by hearsay he knew that Montague had bought other timber in Marion county. It seems to me that the above is the only finding on the facts that can be reasonable. Indeed, the testimony to support this finding is uncontradicted, and I could not find otherwise.

"Now, with the facts so found, what is the law? The deed of W. A. Wall to R. L. Montague did not fix the time within which Montague, or those claiming through him, must or should commence to cut and remove the timber from the land described therein, and also described in the complaint. In a case where the contract in this respect was identical with the one involved here, the Supreme Court of this State, in reversing my decision to the contrary, said, where the contract fixed no time for cutting and removing the timber, the grantee (Montague in this case) had a reasonable time within which to commence cutting and removing of the timber, from the date of the contract. In the case of *Roberts v. Mazeppa Mill Company*, 30 Minn. 415, 15 N. W. 680, the Court held: "That the question of reasonable time is determined by all the circumstances of the case—by placing the Court and jury in the same position as the contracting parties were at the time they made the contract—that is, by placing before them all the circumstances

REP.]

April Term, 1914.

known to both parties at the time.' The above is the law which should guide me in this case. Let us apply the facts.

"What did W. A. Wall at the time of the execution of the deed to Montague know about its being contemplated either by Montague or by the defendant of building mills at Georgetown? Nothing. At that time what did he know of a railroad being constructed from Mullins to Georgetown? Nothing. At that time what did he know of Montague owning or not owning a sawmill or whether he had means of transportation? Nothing. At that time what did he know about the practicability or impracticability of transporting this timber by rail only? Nothing. At that time what did he know about the necessity of constructing a large and expensive plant to warrant the owner or Montague in purchasing this timber? Nothing. Montague testifies in substance that he knew all of the above facts, or had them in contemplation at the time the deed was made to him by Wall. What information at that time does the competent evidence show W. A. Wall had? He knew from hearsay only that Montague had bought other lands in Marion county, and did not know of his holdings and purchases in other counties. At the time of the execution of the deed he was led to believe from the conversation with Montague and also one Freeman acting for Montague that a sawmill would be located in Marion county somewhere near this timber at an early date. I allowed this testimony for the reason that in my judgment any conversation between the parties at the time of the execution of the deed which does in any way affect the terms thereof is competent for consideration in passing upon the question of reasonable time. Montague possibly would have been justified in concluding 30, 20, or 15 years a reasonable time to commence the cutting and removing this timber with all the knowledge he had of these timber contracts at that time, while Wall possibly would have been justified in concluding 5, 8, or 10 years a reasonable time; but I who am to settle this question must take

into consideration what each separately and individually knew at the time the deed was executed. We have, according to the undisputed evidence on the one hand, a man who is an expert in the timber business and in full possession of all the facts and circumstances on the occasion in question connected with this gigantic timber scheme in which he was engaged, making and entering into a contract to purchase timber from Wall, a man, on the other hand, with little or no information when compared with that of Montague. Under those circumstances, where should the hardship fall? Of necessity some one must suffer on account of the contract involved, which I consider a hard contract viewed in any light. I am of the opinion the hardship should fall on him who knew the facts at the time of the contract, rather than upon him who was ignorant of the facts. This being so, I am of the opinion that W. A. Wall, under the facts and circumstances, would have easily been justified in concluding 10 years a reasonable time for Montague or those claiming through him to have commenced cutting and removing the timber. As to my own conclusions from the evidence based upon the law, I am of the opinion that 12 years from the date of the deed would have been a sufficient, reasonable time within which for Montague or those claiming under or through him, to wit, the defendant, to have commenced cutting and removing the timber from the land involved here.

"As to the damages claimed in the complaint, the evidence is that about 20 or 30 trees were cut. For what purpose the testimony is not very clear, but I presume for the purpose of preparing to cut and remove the said timber. I therefore find that the plaintiff is entitled to \$3 actual damages. I do not think the evidence warrants punitive damages.

"It is therefore ordered that the plaintiff have judgment against the defendant for \$3 actual damages. It is further ordered that, the defendant not having commenced to cut and remove the timber from the land involved here within

REP.]

April Term, 1914.

12 years from the date of the deed from W. A. Wall to R. L. Montague, through whom defendant claims, said defendant has lost the right to do so now. It is further ordered that said deed be delivered to the clerk of the Court for the above county to be by him canceled, and in case the said deed cannot be so delivered the same be canceled of record. It is further ordered that the defendant and all others claiming under or through it be, and they are hereby, barred from in any way interfering with the land herein involved or the timber thereon. Let the full record herein used before me be filed in the clerk's office, together with this opinion."

Messrs. Willcox & Willcox, for appellants, cite: *Rights of purchaser*: 12 Rich. L. 314. *Forfeiture should not be declared when parties can be protected by compensation*: 1 Pom. Eq. Juris. 451; 86 Am. St. Rep. 53. *Stare decisis*: 3 S. C. 491; 177 U. S. 558. *A decree for forfeiture would be denial of due process of law*: 166 U. S. 226.

Mr. M. C. Woods, also for appellant, cites: *Testimony as to advice of counsel admissible as one of the circumstances surrounding parties at time of contract*: 9 Cyc. 25; 22 Cyc. 1026; 14 Fed. 167; 89 Fed. 426; 86 Fed. 538. *And to show bona fides*: 2 Bail. L. 623; 141 U. S. 260. *Cases distinguished*: 92 S. C. 418. *Rule of construction of clause in deed*: 58 S. C. 134. *Circumstances to be considered*: 164 Pa. St. 234; 30 Atl. 247; 91 N. W. 1034. *Cases criticized*: 30 Minn. 415; note to 12 A. & E. Ann Cases 913, and cases there cited examined. *Reasonable time*: 89 Miss. 588; 43 So. 2; 70 S. E. 672; 12 A. & E. Ann. Cases 913; 66 S. E. 843; 71 S. E. 559; 75 S. E. 84.

Messrs. Mullins & Hughes, A. F. Woods, and *Henry Buck*, for respondent, cite: *Legal advice as to construction of contract inadmissible*: 20 S. C. 317; 40 S. C. 92; 4 Rich. Eq. 349; 79 S. C. 442; 35 S. C. 354; 36 S. C. 504. *Rights*

of purchaser dependent on circumstances surrounding the parties at time contract was made: 89 S. C. 328. *Contract being silent as to time when cutting should commence parol testimony admissible:* 85 S. C. 493. *Surrounding circumstances admissible:* 43 S. C. 489. *Action affords due process of law:* 92 S. C. 418; 182 U. S. 427; 177 U. S. 230. *Reasonable time an ultimate fact to be ascertained from evidence:* 2 Rich. 67; 10 Rich. 419; 52 S. C. 563; 78 S. C. 73; 89 S. C. 492; 19 A. & E. Ann Cases 919 (note). *Cases referred to:* 89 S. C. 328; 90 S. C. 153, 363; 128 N. C. 46; 83 Am. St. Rep. 661; 134 N. C. 116; 46 S. E. 24; 51 S. E. 852; 50 S. E. 361; 40 Can. Sup. Ct. 557; 12 A. & E. Ann Cases 913; 89 Miss. 588; 119 Am. St. Rep. 707; 111 Ga. 65. *Evidence as to subsequent location of mills inadmissible:* 66 S. E. 843; 21 S. E. 480. *Thirteen years more than a reasonable time:* 50 S. E. 361; 12 A. & E. Ann. Cases 913; 128 N. C. 46; 134 N. C. 116; 46 S. E. 24; 164 Pa. St. 234; 30 Atl. 247.

April 27, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This is an action for equitable relief brought by the plaintiff against defendant. From the allegations of the complaint it appears that on December 24, 1898, W. A. Wall, of Marion county, in consideration of the sum of \$275, sold and conveyed to R. L. Montague and his assigns all the timber above 12 inches stump diameter, 12 inches from the ground at the time of cutting, on a tract of 208 acres. Subsequent to this conveyance the defendant acquired by purchase all the rights, title, privileges, and interest that Montague had in the same. In the contract made by Wall to Montague among other things was the following: "It is agreed that the time limit of this conveyance above set forth shall be five (5) years from the time the second party begins cutting and removing the said timber from the lands above

REF.]

April Term, 1914.

described, but the first party agrees that the said time limit may be extended from year to year thereafter upon the payment by the said second party, his heirs, executors, administrators, or assigns, to the first party, his heirs, executors, administrators or assigns, of interest on the original purchase price at the rate of 6 per cent. per annum." In December, 1911, the plaintiff in this case took from Wall a conveyance in fee of the land upon which the timber conveyed by Wall to Montague was located. This suit was commenced January 10, 1912, for the purpose of having the Court adjudge that a reasonable time had elapsed and expired under a proper construction of the contract as to any rights Montague and his assigns (the defendant) had acquired and for a decree to have the contract canceled and ended because the defendant had failed to commence to cut, or cut and remove, the timber conveyed by the contract within a reasonable time, and had thereby forfeited all rights acquired thereunder. The defendant answered, after issue duly joined, the cause was heard by Judge DeVore, in open Court, in August, 1912, who, on December 23, 1912, filed his decree in favor of the plaintiff. This decree should be set out in the report of the case. Within due time the defendant appealed and asks reversal of the same, and the plaintiff also gave notice that he would ask the Court to sustain the decree on four additional grounds.

The first exception is: (1) His Honor erred, it is respectfully submitted, in sustaining plaintiff's objections to the testimony offered by defendant, tending to prove that defendant and those under whom it claimed secured legal

1 advice before entering into the contract in question, and before acquiring the property conveyed therein, as to the legal effect of said contract, the established law of South Carolina in regard thereto, and the extent of the rights acquired thereunder. He should have held that the accepted opinion prevailing among reputable attorneys at that time as to the effect of the terms of the contract in ques-

tion constituted one of the material circumstances surrounding the parties at the time of the making of the contract, which would naturally have influenced the views of the parties, and which did influence them in their conduct, one with the other, and which should have influenced the Court in determining what was a reasonable time in which to commence to cut the timber in question, and whether or not the defendant should have been held to have forfeited its rights by not proceeding at an earlier date."

We think that this exception is not well taken. This testimony was incompetent and irrelevant and could not throw any light on the question at issue. It does not make any difference in this case what advice appellant obtained from some one learned in the law. Lawyers make mistakes as to what the law is, and Courts differ in deciding what the law is. The defendant took the risk in following advice of its counsel as to whether the advice given was correct law or not. The plaintiff is not seeking exemplary or punitive damages wherein it could be shown that party acted under advice of counsel and thereby show he did not act maliciously or wilfully, and such evidence would be competent to lessen or mitigate damages. There is no contention that counsel advised both parties as to the transaction, and that both acted under that advice; but the attempt was only to show that the advice was given to the grantee as to the construction and effect of the contract. A party can be relieved when he acts under a mistake of fact, but not when he acts under a mistake of law. *Cunningham v. Cunningham*, 20 S. C. 317. In *Porter v. Jeffries*, 40 S. C. 92, 18 S. E. 229, the Court, quoting from 2 Pom. Eq., sec. 843, adopts it as a correct rule: "The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief." The only safe course, where the construction of an instrument is in doubt, is to have the Courts construe it, and,

REP.]

April Term, 1914.

when a person relies on his own construction or the construction of a lawyer, he does so at his own peril that the construction placed upon the instrument is correct. In *Wright v. Willoughby*, 79 S. C. 442, 60 S. E. 971, the Court said: "But it was the duty of the Circuit Judge to construe the deed as written, and no construction put upon it by defendants, or their grantors alone, not assented to nor acquiesced in by the other parties concerned, could avail against the defendant. This exception is overruled.

Exceptions 2 and 3 complain of error on the part of his Honor in his conclusions and findings of fact that, at the time Montague purchased timber from Wall, Montague was a timber expert, and that he erred in finding at that

2 time Montague had purchased timber in other counties. In connection with this latter finding, his Honor used this language: "I find that Wall, at the time of this timber contract, knew of no timber holdings or timber contracts by Montague except in Marion county, and even this only by hearsay." It is incumbent upon the appellant to show by the preponderance of the testimony that his Honor was in error in his findings of fact, and this the appellant has failed to do. *Hickson Lumber Co. v. Stallings*, 91 S. C. 473, 74 S. E. 1072; *Leland v. Morrison*, 92 S. C. 511, 75 S. E. 889.

The fourth exception assigns error on the part of his Honor in considering testimony tending to show that the grantor of the deed at the time of its execution was led to

believe by the purchaser that a mill would be located
3, 5 in the near future near the timber sold; the appellant's contention being that it was inadmissible as far as defendant was concerned in the absence of any evidence showing that any such notice had been brought home to the defendant, who was the subsequent purchaser, and that the contract was in reference to real estate not in writing, and not to be performed in one year, and tended to vary or add to the terms of the written contract. The contract was

silent as to when the purchaser was to commence to cut the timber, and under the law the cutting and removal must be within a reasonable time, and anything that took place at the time the original contract was entered into that would go to show what the parties intended as to the time in which the cutting was to commence, or would in any manner elucidate or throw light on this question, would be competent as evidence to be considered for what it was worth, and would not be varying in any manner the written instrument. There is no contention between the parties about the contract entered into between Wall and Montague. The paper is admitted by both parties here in this suit to be the actual contract, but they differ as to the force and effect of it; one claiming that it is canceled, and the other that it is live and active. The contract speaks for itself and cannot be varied as far as its contents are concerned by parol evidence. But the circumstances surrounding the parties at the time it was made can be detailed, and any separate and independent agreement made at the time, or any understanding separate and apart and not embodied in the contract, and in no sense a part of the contract, entered into in writing, is competent evidence. It was incumbent on the purchaser to ascertain the facts and circumstances of the situation of the parties when he purchased. It was held, in *Flagler v. Lumber Corporation*, 89 S. C. 328, 71 S. E. 849, that the rights of a purchaser under a contract of this kind would depend upon the facts and circumstances surrounding the parties at the time of the execution of the contract, so that the term of years acquired under the contract depended upon these facts and circumstances, and whatever term these facts and circumstances should fix would be the term acquired. The appellant here was charged with knowledge of a proper legal construction of the contract and as to the time that the cutting should commence under the contract depended upon the facts and circumstances surrounding the parties at the time the contract was made, and the defendant was chargeable with that notice.

REP.]

April Term, 1914.

The evidence was pertinent and competent to throw light on the question of what was a reasonable time as contemplated by the parties to the original contract and was properly admitted by his Honor. *Sullivan v. Williams*, 43 S. C. 489, 21 S. E. 642; *Paint Co. v. Bennett-Hedgepeth Co.*, 85 S. C. 493, 67 S. E. 738. This exception is overruled.

The sixth exception is overruled for the same reasons that exceptions 2 and 3 were overruled.

The fifth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteen and fifteenth exceptions will be discussed together as they substantially challenge all of the Judge's finding of facts and conclusions of law, and impute error to him 6, 8 in decreeing as he did upon evidence before him, some of which is excepted to as incompetent. It is reasonable to suppose that the Judge in arriving at his findings of fact was wholly influenced by competent, pertinent testimony relevant to the issues in the case and wholly uninfluenced by incompetent evidence. After a careful inspection of all of the competent evidence in the case we are not prepared to say that he was in error in finding, as he did, "that 12 years from the date of the deed would have been a sufficient reasonable time within which for Montague, or those claiming under or through him, to wit, the defendant, to have commenced cutting and removing the timber from the land involved here." What is a reasonable time under this contract or contracts similar to it? This is a question to be determined upon the facts of each particular case. What may be a reasonable time in one case under the particular facts and circumstances of that case may be unreasonable in another case, and inapplicable by reason of a different state of facts, or a different situation and surrounding circumstances. There is no question that, if a party desires to exercise his right to extend an option which he has, beyond the fixed time he has acquired, before his time expires, if he desires to exercise his option, he must tender and pay the amount agreed upon in advance,

and serve notice that he will exercise his option for the period agreed upon, and will each year in advance pay the amount agreed upon. This payment must be unqualified and in strict compliance with the agreement of the parties. The payment must be unconditional and in advance. In this case there has been no tender, offer, or payment on the part of the defendant to pay the 6 per cent. on \$275, in order to extend the time limit year by year. Neither has the defendant indicated the number of additional years they would claim. If the defendant had commenced to cut and remove timber and needed additional time, it was reasonable and incumbent to tender in advance the 6 per cent. on the purchase price agreed upon, and give notice of the number of years required, and offer to pay in advance each year the 6 per cent. on purchase price, in order that the extended time might be fixed, definite, and determined, and each party know what to rely on as to whether extension of time claimed in the absence of an agreement fixing the time could have been determined.

Under contracts of this character, the purchaser has only the right to have a reasonable time to get the fruits of his purchase. He has no right to enjoy by indefinite extension what would practically amount to a perpetuity and deprive the owner of the enjoyment of his property. What is a "reasonable time" depends upon the circumstances of each case, and is a question of fact, and no particular rule has yet been laid down to govern cases. *Ould v. Spartanburg Realty Co.*, 94 S. C. 187, 77 S. E. 866. It has been decided by this Court, in *Flagler v. Lumber Corporation*, 89 S. C. 328, 71 S. E. 849; *McLary v. Lumber Corporation*, 90 S. C. 153, 72 S. E. 145, and *Atlantic Coast Lumber Co. v. Litchfield*, 90 S. C. 363, 73 S. E. 182, that the grantee must begin the removal of timber within a reasonable time, and it follows as a natural logical and irresistible sequence that, upon the failure to commence the removal within a reasonable

REF.]

April Term, 1914.

time, the estate or interest granted is terminated and the interest granted reverts to the grantor or his privies. His Honor with all of the facts before him has found that a reasonable time had elapsed and the defendant had not commenced to remove the timber and by reason of this failure his contract was terminated and he has no further right to remove. We find nothing in the case that would warrant us in reversing this finding, and appellant has failed to convince us that his Honor was in error in finding as he did. While it is true in reference to forfeiture, as was said in *Davenport v. Latimer*, 53 S. C. 572, 31 S. E. 630: "But, since equity leans to compensation in preference to forfeiture, the vendee, if he cannot show exact compliance with the contract on his part, may still have specific performance or compensation, provided he is not guilty of laches in the ascertainment of his claim, stands ready and willing to comply, and shows reasons satisfactory to the Court in excuse of his failure to comply"—it may be that in some of the cases that may arise under similar contracts that parties may bring themselves within this principle, but under the evidence here defendant has failed by its laches to excuse its default in not commencing to remove the timber under the contract within a reasonable time under the circumstances of the case. This delay works injury to the plaintiff. He is deprived of the use of his property. He gets no benefit out of it by reason of being allowed to till or pasture it. He is deprived of the new growth of timber on the land; he gets nothing for the increased size of the timber growing all this time. He pays taxes on the land, and for all of this defendant makes no offer of compensation to him at all. Ordinarily a forfeiture will not be declared where a full compensation can be made for the damage in money. We do not think it was necessary for the vendor to give any notice to the defendant to commence to remove the timber, the defendant knew what the contract was, and it is to be presumed knew what its rights

under it were and enforced or abandoned its rights as it saw fit.

Exception 14 is overruled, as the complaint, properly construed, put them on notice in plain and explicit terms as to the relief asked for from the Court, especially section 8 thereof. This precise question was determined in *Jones v. Atlantic Coast Lumber Corporation*, 92 S. C. 418, 75 S. E. 698. We do not think the exceptions taken by defendant complaining that his Honor erred in declaring the contract forfeited. The contract in question was not an absolute conveyance in fee, but determinable or qualified contract, and when there was a breach of the same by reason of defendant failing to avail itself of the terms of the contract, then its rights therein were terminated. The contract was in the nature of a lease. During the life of it, as it were, the defendant had the right to remove the timber. Having neglected to do this within the time found and fixed by the Court, the defendant has no further interest or rights in the timber, and it reverts to the grantor or his assigns. The contract being terminated by failure of defendant to remove the timber within a reasonable time, we do not see that the Circuit Judge was in error in deciding that the plaintiff was entitled to the timber, and that the defendant had no further rights under the contract. All exceptions are overruled.

Judgment affirmed.

MR. CHIEF JUSTICE GARY and MR. JUSTICE HYDRICK, concur.

MR. JUSTICE FRASER, *dissenting*. To me the reasonableness of 12 years and the want of reasonableness of 13 years is not apparent. Forfeitures are rarely ever enforced in equity and not favored in law.

It seems to me that the difference of conditions between a time that is reasonable and a time that is not reasonable

REP.]

April Term, 1914.

ought to be material. If the unfavored forfeiture is to be declared, a distinction ought to represent a difference. Here I see none.

MR. JUSTICE GAGE did not sit in this case.

NOTE: This case has been carried to the United States Supreme Court on writ of error.

8862

LINDLER v. COLUMBIA HOSPITAL.

(81 S. E. 512.)

ELEEMOSYNARY CORPORATIONS. CHARITIES. LIABILITY FOR NEGLIGENCE OF EMPLOYEES.

An eleemosynary corporation conducting a hospital for the care of the sick, some of whom are cared for freely, and others of whom pay fees for such care, more or less in accordance with their circumstances; all funds so received being devoted, along with gifts and bequests, to the maintenance, support, improvement and equipment of the hospital, is a public charity; and is not responsible to a patient for injuries resulting from the negligence of its servants selected with due care.

Before SEASE, J., Richland, February, 1913. Reversed.

Action by Nan Lindler against the Columbia Hospital of Richland county. The facts are stated in the opinion. The case having been argued before the Supreme Court, and the judgment below affirmed by a bare majority, the Circuit Judges were called to the assistance of the Supreme Court, which, sitting *en banc*, heard the case on 5th June, 1914.

Messrs. Melton & Belser, Edward L. Craig and W. H. Cobb, for appellant, cite: Eleemosynary corporation not liable to beneficiary for tortious act of its servants selected with

due care where there was no wilfulness: 6 Cyc. 975, 976; 7 L. R. A. 485; 34 L. R. A. (N. S.) 317; 31 L. R. A. 224; 66 Conn. 98; 118 Ga. 647; 45 S. E. 483; 218 Ill. 381; 2 L. R. A. (N. S.) 556; 104 Ky. 456; 47 S. W. 342; 11 L. R. A. (N. S.) 711; 14 L. R. A. (N. S.) 784; 63 Md. 20; 7 L. R. A. (N. S.) 481; 120 Mass. 432; 33 L. R. A. (N. S.) 141; 120 Mo. App. 675; 99 S. W. 453; 25 L. R. A. 602; 32 L. R. A. (N. S.) 65; 67 S. E. 971; 137 N. W. 1120; 41 L. R. A. (N. S.) 973; 85 Ohio 90; 39 L. R. A. (N. S.) 427; 121 Pac. 901; 227 Pa. St. 254; 11 L. R. A. (N. S.) 1179; 8 L. R. A. (N. S.) 1165; 145 S. W. 1030; 47 C. C. A. 122; 65 L. R. A. 372. *Rule not altered by patient paying:* 41 L. R. A. (N. S.) 973. *Rule for public and private charities the same:* 121 Ill. App. 512; 218 Ill. 381; 28 L. R. A. (N. S.) 556; 75 N. E. 991; 4 Ann Cases 103; 22 L. R. A. (N. S.) 487. *Characteristics of eleemosynary or charitable corporations:* 2 L. R. A. (N. S.) 556, note; 60 Fed. 365; 9 C. C. A. 14; 13 L. R. A. 581; 120 Mass. 432. *Cases distinguished or criticized:* 128 Am. St. Rep. 358; 14 L. R. A. (N. S.) 787; 6 L. R. A. 779; 34 Am. Rep. 678; 7 L. R. A. (N. S.) 484; 59 S. E. 945.

Mr. D. W. Robinson, for the respondent, cites: *Is defendant a public charity:* 154 N. Y. 14; 38 L. R. A. 596, 597; 2 Words and Phrases 1075, 1076; 2 How. 146-152; 109 Fed. 204; 47 C. C. A. 122; 78 N. E. 855; 7 L. R. A. (N. S.) 482, 484; 75 Atl. 1088. *Or even an eleemosynary institution:* 4 Wheat. 633, 634, 640; 8 Wheat. 464; 113 Cal. 129; 35 L. R. A. 270. *Hospital liable for failure to exercise care:* 127 Ky. 564; 128 Am. St. Rep. 356, 358, 359; 55 L. R. A. 27; 6 L. R. A. 779, 780; 34 Am. Rep. 678, 679, 681, 683, 689, 690; 30 N. B. 279; 5 Thomp. Corp., secs. 6363, 6364, 6365; 79 Atl. 987. *Liability of eleemosynary corporations:* 77 S. C. 12; 221 U. S. 636, 646-648.

REP.]

April Term, 1914.

June 22, 1914.

The opinion of the Court, *en banc*, was delivered by MR. CHIEF JUSTICE GARY.

This is an action for damages alleged to have been sustained by the plaintiff, through the negligence of one of the nurses employed by the defendant, in placing the plaintiff in the bed where there were hot bottles that burnt her severely, while she was unconscious, after undergoing a surgical operation. The jury rendered a verdict in favor of the plaintiff for \$1,800, and the defendant appealed upon exceptions assigning error, on the part of his Honor, the presiding Judge, in refusing a motion to direct a verdict in favor of the defendant, on the ground that "the uncontradicted evidence shows that it was a charitable or eleemosynary institution, and, as such, is by law exempt from liability for the injury sued upon."

The rule is thus stated in 6 Cyc. 975, 976: "A charitable corporation is not liable for injuries, resulting from the negligent or tortious acts of a servant, in the course of his employment, where such corporation has exercised due care in his selection. While this rule of law is well established, the reasons assigned for it are not uniform. Some Courts hold that the funds of a charitable corporation cannot be appropriated to payment for an injury arising from the neglect or wrongdoing of the servants; others exempt charitable corporations from liability, on the ground of public policy; still others hold that one who accepts the benefits of a charity assumes the risk of negligence."

To the same effect is the principle announced as follows in 5 Enc. of Law, 923: "With regard to the liability of charitable corporations or their trustees, for the negligence of agents or employees, there is some difference of opinion; but the decided weight of authority denies such liability. This on two grounds: First, that if this liability were admitted, the trust fund might be wholly destroyed, and diverted from the purpose for which it was given, thus thwarting the

donor's intent as the result of negligence for which he was in nowise responsible. Second, that since the trustees cannot divert funds by their direct act, from the purpose for which they were donated, such funds cannot be indirectly diverted, by the tortious or negligent acts of the strangers of the funds or their agents or employees."

In the notes also in the argument of the appellant's attorneys, there are numerous authorities sustaining the forgoing texts.

The true ground upon which to rest the exemption from liability is that it would be against public policy to hold a charitable institution responsible for the negligence of its servants, selected with due care. But the question whether it would be liable for negligence in the selection of its servants without due care is not before the Court for consideration.

Much confusion has arisen from the effort to apply language used in some of the English and American decisions to cases in which the facts were entirely different from those in which it was used. *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453.

We have been able to find only a single case decided by any Court in the United States in which it was held that a charitable institution was liable for the negligence of its servants when that question was involved, to wit, *Glavin v. R. I. Hospital*, 12 R. I. 411, 34 Am. Rep. 675, and in that case the language of the Court was broader than was warranted by the facts. After that decision was rendered the legislature of Rhode Island enacted a statute changing the rule announced by the Court.

The next question for consideration is whether the defendant is a charitable corporation. The following admission on the part of the plaintiff's attorney appears in the record: "Mr. Robinson: I do not contend it is not an eleemosynary institution; it is an eleemosynary institution under the laws of this State, the charter says that; I do take an issue about

REF.]

April Term, 1914.

the question of charity, whether it falls under a public charity." The petition for a charter recited that its purpose was "to conduct and carry on a hospital for the care and treatment of the sick," and in article 1 of the constitution it is stated that "its object shall be to erect and maintain a hospital at Columbia, S. C., for sick persons." The incorporators were certain physicians of Columbia and a number of ladies, but the ladies afterwards resigned, and, under a resolution adopted by the association, an arrangement was made by which their places were filled by physicians; but the general purposes of the organization were to be continued of force, without material change, as will appear from section 4 of the resolution, which was as follows: "In this way all the rights, privileges, and immunities of the present organization will be preserved, its obligations of every nature whatsoever will be respected and remain unimpaired, and the hospital building and improvements will be left with the names, under which it has been fostered, through the care and zeal and self-sacrifice of the ladies." The charitable nature of the defendant is thus stated in its answer: "The defendant is not a business corporation and has no stock or stockholders, but is an eleemosynary or charitable corporation, and as such conducts a hospital in the city of Columbia, in said county and State, and holds all of its property in trust for the conduct and maintenance of the same; that said hospital is supported and maintained in part by gifts and bequests, which are and have been made to it from time to time, and in part by fees and charges paid by patients treated therein; that in the conduct of said hospital some patients are treated entirely free, and others pay more or less according to their circumstances, but all sums so received are devoted solely to the maintenance, support, improvement, and equipment of said hospital as an eleemosynary institution."

The respondent's attorney urges several reasons why the defendant cannot be regarded as a charitable institution so

as to be exempt from liability for the negligence of its servants.

In the first place, he relies upon the fact that the defendant is controlled by the physicians of Columbia, who are members of the hospital association. We have already shown that they are mere trustees for the purpose of carrying into effect the original purposes for which the hospital association was organized. They are not entitled to any part of the profits, and the only benefits they derived from the association are merely incidental to their practice. There is no common fund to be divided among the physicians, but each must look to the particular patient employing him for his fee without reference to the fees of the other physicians.

The second ground upon which the respondent relies is that the defendant is not a public charity. The defendant is a public charity, but the same principle would apply if it were a private charity. *Parks v. N. W. University*, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556, 4 Ann. Cas. 103, and note.

The respondent next relies upon the fact that the plaintiff was a pay patient. In order to show that this proposition is untenable, it is only necessary to refer to the cases of *Jensen v. Maine Eye & Ear Infirmary*, 107 Me. 408, 78 Atl. 898, 33 L. R. A. (N. S.) 141, and *Duncan v. Nebraska Sanitarium*, 92 Neb. 162, 137 N. W. 1120; 41 L. R. A. (N. S.) 973, Ann. Cas. 1913E, 1127, in which it was held that a hospital supported mainly by charity does not lose its character as a charitable institution by the fact that it accepts compensation and makes a charge for the use of rooms to those who are able to pay for them.

The next ground upon which it is urged that the defendant should be held liable is that the hospital is a training school for nurses. This is a mere incident to the main purpose for which the association was chartered and does not destroy its charitable nature, but tends to render it more efficient. Furthermore, the question whether the defendant

REF.]

April Term, 1914.

exercised due care in the selection of its employees was not an issue in the case.

Lastly, it is contended that the hospital is a convenient and practical necessity and adjunct in the practice of the physicians. The respondent relies upon the case of *University of Louisville v. Hammock*, 32 Ky. Law Rep. 431, 106 S. W. 219, 14 L. R. A. (N. S.) 784, in which the Court used the following language: "Appellant's third contention, that it is a charitable institution, and, by reason thereof, exempt from liability for the negligence of its servants, is in conflict with more than one decision of this Court. The hospital in which appellee received the injuries complained of is an adjunct of the appellant's school of medicine, known as the 'University of Louisville,' and is maintained principally because of the advantages it affords to the students and professors of that institution. It is, however, also conducted for compensation and profit. In the main, patients received and treated at the hospital are required to compensate those in charge of it for the services rendered. This is certainly true, according to the evidence, as to patients able to pay. It is true some patients unable to pay are received and treated free of charge, but this does not show that appellant conducted a purely public charity; and, to escape liability for the wrongful acts or negligence of its servants, it should have proved that such was the character of the hospital and the use to which it is devoted." The Court then proceeds to quote the following language from the case of *Gray State Infirmary v. Louisville*, 65 S. W. 11, 23 Ky. Law Rep. 1274, 55 L. R. A. 270: "Dr. Grant testified that the institution would not have been established, except that the incorporators hoped to receive pecuniary advantage from it, either directly or through their connection with the college. We have no doubt from the testimony that the professors in the medical college do a great deal of charitable work in the infirmary; yet the real purpose in establishing the infirmary was to make their college more attractive to students, and to induce

attendance by reason of instruction and clinical experience, received in the infirmary, and in this way to increase the pupils of the professors operating the college. Certainly such an institution cannot be exempt from taxation, on the ground that it is purely an institution of public charity." The Court also quotes the following language from the case of *Wathen v. Louisville*, 85 S. W. 1195, 27 Ky. Law Rep. 635: "It is manifest from the evidence that the hospital is maintained because it is necessary to the successful conduct of the school of medicine. Without the clinical instructions and operations by the professors in the presence of the students the school could not be maintained with success. The hospital is an adjunct or a part of the medical school. Whatever gain may result from the operation of the medical school goes to the owners of the property. While the evidence shows a great deal of charity work is performed in the treatment of patients and in dispensing medicines, still the institution is conducted for profit. As it is operated for gain, no part of it is exempt from taxation." It will thus be seen that the infirmary was a mere incident to the medical college, and that the profits were not devoted to charity, but to private ownership.

In the case under consideration, however, the profits arising from the management of the hospital must be expended for charitable purposes, and not for the private benefit of the physicians in charge thereof.

Judgment reversed.

MR. ASSOCIATE JUSTICE HYDRICK, and CIRCUIT JUDGES PRINCE, MEMMINGER, DEVORE, SHIPP, FRANK B. GARY, SPAIN and MOORE concur in the opinion announced by the Chief Justice.

MR. JUSTICE FRASER, *dissenting*. This is an action for damages for personal injury. The plaintiff was suffering from appendicitis and under the advice of her physician, she went to the defendant hospital where the operation was to be

REF.]

April Term, 1914.

performed by her own physician, under whose advice she went to the hospital. After the operation, and while the plaintiff was still unconscious from the effects of the anæsthetic, she was turned over to a hospital nurse and put to bed in the hospital. As the plaintiff began to regain consciousness, she complained of burning up. The plaintiff's mother was with her and asked the nurse the cause of her daughter's complaint. The nurse replied that the plaintiff was suffering from the effects of the anæsthetic only, and nothing was wrong. The complaints continued and the mother investigated the matter and found that the hot water bottles had not been removed from the bed, where they had been put to warm the bed to prevent shock from a cold bed. The plaintiff was seriously burned. She was kept at the hospital for several weeks on account of the injury and claims to have suffered for a considerable time thereafter.

While there was a conflict of testimony as to the extent of the injury, there is no dispute as to the fact of injury or that it was negligence to leave the hot water bottles in the bed and put the plaintiff upon them.

The defense is that the defendant is an eleemosynary or charitable corporation, and, as such, is not liable in damages for the negligence of its employees.

It seems that some worthy and charitable ladies in Columbia some years ago established this hospital. That donations were received from several sources. Later the medical association took charge of the hospital under an agreement with the ladies. The ladies retain certain free beds. The city sends its charity patients there. There are three classes of patients received: a. Charity patients who, themselves, pay nothing. b. Ward patients, who pay a cheap rate. 2. Patients who have separate rooms; these pay more.

There is serious question as to whether there are, so far as the hospital is concerned, any charity patients. The city pays for its patients, and there was valuable property turned

over to the present management by the ladies for the
1 beds assigned to them; but this question need not
obscure the issue. It is claimed that no patients are
turned away because they cannot pay. The plaintiff chose
a ward bed and agreed to pay all that was demanded for a
ward bed. After she left the hospital, she demanded her
bill, but it was not furnished. It is claimed that the pay-
ments made by those in the ward beds did not fully meet the
expenses of the ward beds, and they are in part, at least,
charity patients. This opinion will consider the broad ques-
tion presented here: Is a hospital with a charitable founda-
tion liable to patients for injuries caused by the negligence
of the employees?

There is no case in this State on the subject, and for
authority we must go to other jurisdictions. We are bound
by our own decisions. We are not bound by the decisions
of other States. They are useful as evidence of what the
law is, and the testimony of these expert witnesses is to be
estimated, not by their number, but by their weight. The
weight is to be determined by their conformity to well
known principles of law. We have no right to follow these
witnesses when their testimony conflicts with well known
principles of law, established in our own State.

Here is an association whose servant, it is alleged, has
done an injury and done it negligently. To the question: is
the person, association, or corporation whose servant, acting
within the scope of his employment, has, in violation of a
duty, produced injury to another, liable? The answer, as a
general rule, is: It is liable. The doctrine *respondet
superior* is familiar and its application wide. There are
exceptions, but that is the rule. When the question is asked,
does this apply to an institution that has a charitable founda-
tion, the answer is not uniform. The greater number of
cases hold that the rule does not apply. In some of the
jurisdictions it is held that the rule does apply and it will
take legislative power to exempt them.

Rep.]

April Term, 1914.

It sometimes happens that there are conflicting principles of law that apply, and then it is the province of the Court to say which principle governs the case. Those who hold that a charitable hospital is immune from suits for damages to a patient, caused by the negligence of its employees, do not agree among themselves as to the conflicting principle. I will not discuss the cases separately. Their name is legion.

(a) Some hold that to allow recoveries for damages would be to assist in the destruction of a trust fund, and no Court can permit a destruction of a trust fund. Those who hold this ground of immunity do not agree among themselves, for many of them qualify the statement of immunity with the statement "provided the hospital has not been negligent in the selection of the employees." *Bruce v. Central M. E. Church*, 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 160. Others say that, while a hospital is not liable to patients under its care, it is liable to third persons. *Thornton v. Franklin Square House*, 200 Mass. 465, 86 N. E. 909, 22 L. R. A. (N. S.) 487. What seems to us to be the inconsistency of these positions prevents us from following them. In the cases of damages for negligence in selecting employees and cases of damages for negligence of the employees, the destruction of the trust fund is the same. How is it a destruction of the trust fund? It is said, here is a trust fund intended for good, and it must be preserved at all hazards. It is a principle of law as well as morals, that men must be just before they are generous. There is no higher or more just principle than that a trust fund shall remedy the evil itself has done, before it attempts to remedy the evils done by others. We cannot follow this.

(b) Some of the cases say that the action should be brought against the trustee, and, when he has paid it, he can be reimbursed out of the trust fund. This needs no comment.

(c) Some cases hold that the exception is based on an implied contract of immunity and make this statement (147

Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 159): "They rest upon the principle, correctly stated in *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372, viz., that the beneficiary of such charitable trust enters into a contract, whereby he assumes the risk of such torts. It is not surprising that years should have elapsed before the correct legal principle governing these cases was announced in *Powers v. Massachusetts Homeopathic Hospital*. The discovery of correct legal principles, like the discovery of scientific and social truths, requires time and patient investigation." That case (the Powers case) held that the contract was implied. We are told, in effect, that a patient entirely unskilled in legal principles, his body racked with pain, his mind distorted with fever, is held to know, by intuition, the principle of law that the Courts after years of travail have at last produced. We cannot accept a rule based upon after-discovered reasons. We confess that it is new doctrine to us that a Court will assume an implied contract to relieve against liability for future negligence.

The notes to 23 L. R. A., page 200, tell us that the doctrine of immunity from damage suits originally arose in cases in which hospitals were operated by governmental agencies. Of course, as a rule, a government is not liable for the negligence of its employees. If the doctrine had been confined to its original declaration, there would have been no trouble; but, when the exempting circumstance does not exist, the immunity ought not to exist. The result of these holdings is that, where a small charitable foundation is secured, a hospital may be opened; patients secured, who go there under an invitation that promises skilled physicians, competent trained nurses; advantages promised that cannot be secured at home; then, when the patients are secured, they may be neglected, burned with fire or vitriol, put into beds from which other patients afflicted with contagious, loathsome, and it may be disgraceful diseases have been

taken, and we are told there is no remedy except to sue, it may be, a poor, overworked, broken down, friendless, helpless woman. We are not reflecting on the appellant hospital, we are ready to believe that the injury here was simply one of those acts of inadvertence that sometimes befall the most careful of men and women. The thing to which we protest is the absolute immunity given to all hospitals that can secure a charitable foundation from the most brutal and inhuman treatment of those unfortunate men and women who may be carried (sometimes without their knowledge or consent) within its walls, under an implied contract. It is said the patient is not without remedy—sue the woman.

(d) The income from the pay patients might be set apart to pay a judgment (in this case about \$40,000 per annum), but some of the cases hold that the pay patients, when they enter a hospital with a charitable foundation, are really charity patients, and the weekly sum they are required to pay are not payments at all, but contributions to the charity fund. This is brilliant, but is not convincing. We think the first duty of every man and the first call upon every fund is to repair the evil of its own doing, and then the remaining fund or remaining strength may be devoted to charity. It may be said the hospital rules forbid the taking of patients with contagious diseases. The contagious nature of the disease may not be known until too late. If these hospitals are held to be immune, they may break the rule with impunity.

(e) Another reason given is that it is not in accord with public policy to allow these good people to be annoyed by damage suits. They are good people, but the legislature fixes the public policy of a State. The reason for this supposed public policy is not altogether clear. Is the damage suit an evil spirit invented by men to harass soulless corporations and from its evil influence the good are immune? If so, they ought to be abolished altogether. That is not the theory. The theory is that, in a damage suit for simple negligence, the evil of the past is compensated for, and for wil-

fulness, evil for the future is prevented. 32 Cyc., p. 1251, Public Policy. "The term has been said to mean the law of the State whether found in the Constitution, statutes, or judicial records." There is nothing in the Constitution, statutes, or judicial records to warrant immunity. Public policy is not the opinion of a Judge as to what ought or ought not to be. See *Magee v. O'Neill*, 19 S. C. 185, 45 Am. Rep. 765. The legislature of this State has in recent years passed several acts that remove the immunity from governmental agencies, such as cities and counties, and require them to respond in damages for injuries caused by the negligence of their employees. We cannot, therefore, say that it is against the public policy of this State to require the wrongdoer to pay damages caused by the negligence of employees. The foundation of the original doctrine has been destroyed in the State, and this offspring ought to die with it. The rule is clear and certain that, if a physician undertakes to attend a patient through charity, he is bound to exercise due care and skill and is responsible for negligence. If, however, several combine and subscribe a fund and call it charity (more convenient still, if, as here, some one else will furnish the money), it shall cover a multitude of sins, and it makes no difference what happens, there are only two remedies. One is to close up the place as a public nuisance, and the other is to sue the woman. Neither of these is a remedy.

(f) If the proviso "that they shall not be negligent in the selection of the employees" be law, then the use of the undergraduate as a nurse, to whose skill the school is unwilling to certify in a diploma, may be conclusive evidence of negligence. The proviso is mere dictum and binds no one. The conflict between the doctrine of immunity and proviso is patent. Both cannot stand.

(g) We are told that they have an arrangement with the city to care for its poor. The hospital is not under the control of the city. The city might make an arrangement with

REP.]

April Term, 1914.

a purely private institution. There is some dangerously broad language in the statute as to municipal responsibility for negligence in things under the control of the city, and little help can be derived from this association.

One of the Courts that denied immunity said that, in the administration of the trust, acts of negligence are as sure as that its administration should be committed to human hands, and it is not too much to suppose that a right-minded donor should be held to have had in contemplation the general rule as to responsibility for its results. Compare that statement with the doctrine of an implied contract of releases from liability for future negligence, and it seems to us that the weight of authority is with those few who assert liability, and not with those who assert immunity.

Courts ought to follow established rules and not destroy them with unwholesome exceptions. Courts ought not to legislate, but, if they must, then their legislation should be wise and safe. We do not think it wise or safe to allow an institution to exist, with unlimited power to do evil and make that institution powerless to repair the evil, because some good man or woman has contributed a fund and intended thereby to do good. We ought to see clearly the result of what we do. If the Courts can take no part of the corpus or income to repair the evil that may be done, neither can the trustees. It would be a breach of trust for them, if the Courts so hold. There has never been a time when the world was subject to such rapid and fundamental changes in the art of healing as today. Truly the wisdom of yesterday has become the foolishness of today. It has not been long since the sick were told to stay out of the night air, because the night air was deadly. Today the sick are told to sleep in the night air, because the night air is life-giving. Neither the constitution of man nor the constituent elements of the night air have changed. Every new doctrine has its believers. There are those who believe in the inerrancy of the wise men of today, and have blind faith in the latest

nostrum. There are those who have aggressive disbelief in all things human, and believe that in the prayer of faith alone is there healing power. May the devotees of either extreme erect their hospitals, the one to remove from the human body every organ they do not understand and choose to call the "mistakes of nature," the other to throw their patients upon a bed and leave them to suffer and to die while they pray, ignoring the revelation that "faith without work is dead," and the Courts are powerless to repair the evil done? There may be unbounded funds from which some reparation may be made. Is there no way to make it? We think there is. We think the Courts ought to hold the fund, first to repair the evil done by itself, because the purpose of the trust is to do good and not evil. We know a trust fund cannot be diverted to a different purpose from that for which it was created. That is established law and we want to further the purpose of the trust. The purpose of the trust is to relieve suffering, and not to increase it, when, in the administration of the trust, suffering is increased, the purpose fails. The Courts that declare immunity are destroying and not maintaining the trust.

MR. JUSTICE WATTS and CIRCUIT JUDGES WILSON, BOWMAN and RICE concur in the dissenting opinion of Mr. Justice Fraser.

MR. JUSTICE GAGE, *also dissenting*. I concur with Mr. Justice Fraser and Mr. Justice Watts.

Respondent concedes that the defendant is an eleemosynary institution, whatever that may mean; but denies that it is a charity, as that word has been best expounded.

There is no doubt about the rule laid down generally by the Courts. that a charity is not liable for a tort.

That rule was promulgated when charities were rare and were small and were real and it sprang out of the tenderness of the Judges for those who devoted their unrequited energies to the service of humanity; for them, the Judges

R2P.]

April Term, 1914.

thought, the hard rules of legal liability ought to be relaxed. And for a real charity, that ought to be the rule everywhere. But things have changed; today there are hospitals all over the State, some of them owned by a single individual, some of them owned by an aggregation of individuals. Those who have eyes and ears know this to be true.

It is safe to assume that not one of them has a capital stock, and not one of them pays a dividend as such.

If an individual doctor working in his own hospital should injure a patient like the plaintiff was injured he would be liable to suit.

In the case at bar the hospital may have started, and been for years managed, much like a genuine charity.

The elect women of Columbia built it, and equipped it, and started it going for pure love. They then turned it over to a number of doctors to manage according to their own notions, and "because it had become burdensome to them." At the time of this injury the hospital was controlled by twenty-five doctors of Columbia; its income was about \$45,000, of which Columbia contributed \$3,600; it had generally fifty patients, and could hold no more; it charged well nigh all who came, except there were some free beds.

There is nothing about the entire business as managed to differentiate it from the hospital of those gentlemen who undertake to manage a hospital single handed, except the ladies donated this hospital to the doctors and the city of Columbia appropriates \$3,600 a year to keep it going.

The same rule of liability ought therefore to apply to all persons like circumstanced, and that is the rule of liability for wrong conduct, whether done by one's self or through one's agent.

It may be the plaintiff shall not be able to collect her judgment; but "we have no right to proceed on the theory that if, at the end of the litigation, plaintiff establishes her right to damages, the judgment would not be paid." *Hopkins v.*

Clemson Agricultural College of South Carolina, 221 U. S. 648, 31 Sup. Ct. 658, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243.

I see no reason to change my opinion. The brick and mortar of the trust may not be liable to pay the judgment; but the funds are.

8646

BENNETT v. SOUTHERN RY.—CAROLINA DIVISION.

(79 S. E. 710.)

MASTER AND SERVANT. FEDERAL EMPLOYERS' LIABILITY ACT. EVIDENCE. ISSUE FOR JURY. CHARGE. APPEAL AND ERROR. ACTION FOR WRONGFUL DEATH. DAMAGES. NEW TRIALS.

1. In an action for the death of a locomotive fireman, who was killed when the engine was derailed at a burning trestle, evidence of the engineer's reputation for carefulness is inadmissible.
2. In an action for the wrongful death of a locomotive fireman, killed when his engine was derailed at a burning trestle, where it appeared that immediately after another engine had passed over the trestle it was discovered to be on fire, testimony of a witness that he saw places near by where fire had been dropped is admissible as tending to show the origin of the fire.
3. If there is any competent evidence at all tending to sustain the allegations of the complaint, the case should be submitted to the jury, and nonsuit denied.
4. A statement in the charge that proof of an injury to a servant by defective machinery was *prima facie* evidence of negligence on the part of the master was not error, where from the whole charge it was made clear that plaintiff could not recover, unless she showed affirmatively by a preponderance of the evidence that the injuries sued for were caused by the master's negligence.
5. As the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) is general in its terms, and makes no specific regulations as to the quantity and method of proof of negligence, the laws of the State wherein the action is brought govern, and hence, even in an action brought under such statute, proof that the injury was caused by defective appliances makes out a *prima facie* case of negligence on the part of the master, where that is the rule of the State.
6. In an action for the wrongful death of a locomotive fireman, brought under the Federal Employers' Liability Act (Act April 22, 1908,

REP.]

April Term, 1914.

- c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), the Court charged that proof of injury to defendant by defective machinery was *prima facie* evidence of negligence on the part of the master. Other portions of the charge correctly stated the master's duty to furnish the servant with a safe place to work and appliances; it nowhere being even intimated that the master was an insurer of the safety of his servant. The charge further limited the jury to a consideration of the negligence specified in the complaint, and required proof by a preponderance of the evidence to justify a verdict for plaintiff. *Held* that, as the Court required the jury to consider the charge as a whole, it was not objectionable as a charge upon the facts.
7. Where the Court gave the requests of defendant, he cannot complain of the error therein.
 8. The recovery under Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) for the wrongful death of a servant is limited to compensation for pecuniary loss.
 9. A recovery of punitive damages allowed in case of wrongful death under Federal Employers' Liability Act, is limited to the material loss which is susceptible of a pecuniary valuation, and does not include the inestimable loss of the society and companionship of a deceased relative, though it is broad enough to include damages for the loss of the services of husband or wife, and, in case the beneficiary is a child, damages for the loss of training, counsel, education, and nurture which the deceased would have bestowed.
 10. Where there is sufficient testimony to support the verdict, the allowance of a new trial is discretionary with the trial Court.

Before SEASE, J., Winnsboro, September, 1912. Affirmed.

Action by Hattie E. Bennett, as administratrix of the estate of Luther W. Bennett, deceased, against the Southern Railway—Carolina Division and the Southern Railway Company, for wrongful death of plaintiff's intestate under provisions of Federal Employers' Liability Act. Judgment for plaintiff, and defendants appeal.

The defendants' exceptions were as follows:

Please take notice that the defendants, in accordance with their notice of appeal heretofore served upon you, now

make and file the following exceptions to the rulings and to the charge of the presiding Judge made upon the trial of the above stated case:

1. Except because the presiding Judge erred in excluding and not allowing the question and answer of the witness, W. H. Green, on cross-examination, as to whether he considered McAlister, one of the defendants' engineers, and in charge of the train on which plaintiff's intestate was killed, one of the most careful engineers in the service, this testimony being proper in reply to the charges and specifications of negligence made in the complaint as to the running of the train on which the deceased was at the time of his death, the error being in denying the right of the defendants to show the general reputation and character of its servant who had charge, and was alleged to have been reckless in the management and operation of its engine, which said reckless operation resulted in the death of the deceased, and, further, who was also charged with wilful and wanton conduct in running and operating its train at a dangerous and reckless rate of speed, and in failing to keep and maintain any lookout or give any signal or warning to plaintiff's intestate.

2. Except because the presiding Judge erred in allowing and permitting the witness, W. A. Summers, on his direct examination, over the objection of defendants, to testify that he saw a couple of places where fire had been dropped out at a point about a mile above Alston, and at least two and a half miles from the trestle in question, the error being that such testimony was incompetent and irrelevant, such fires not being shown to have originated from coals escaping from defective, old or burned-out ashpans and grates, as charged in the complaint, but originating from sparks from the smokestack, and no negligence being alleged as to defects in the smokestack or as to fires connected therewith.

REF.]

April Term, 1914.

3. Except because the presiding Judge erred in not granting a nonsuit in the cause upon motion of defendants, there being no testimony showing or tending to show any negligence upon the part of the defendants or breach of duty owing to plaintiff's intestate in the particulars alleged in paragraph 7 of the complaint:

(a) It appearing that there was no evidence showing or tending to show negligence, as specified, in subdivision (a) of paragraph 7 of the complaint, that the defendant company carelessly, recklessly, wantonly and wilfully operated locomotive engines on its line of railroad over the trestle bridge therein mentioned, which said engines contained defective, old and burned-out ashpans and grates which permitted sparks and live coals to drop on said trestle bridge.

(b) It appearing that there was no evidence tending to prove the allegations of negligence contained in specification (b) of the 7th paragraph of the complaint, that there was a failure to inspect the trestle bridge on which plaintiff's intestate was killed, or that said trestle bridge was composed of old, worn-out and defective timber and materials which caused the same to become easily ignited by fire.

(c) It appearing that there was no testimony to prove or tending to prove negligence, as specified in subdivision (c) of the 7th paragraph of the complaint, that the defendant company furnished and maintained an unsafe and dangerous place, to wit: the trestle bridge, upon which plaintiff's intestate was required to perform the duties required of him as locomotive fireman.

(d) It appearing that there was no testimony to prove or tending to prove that the defendant company failed to properly inspect and repair the engines and parts of engines through which fire, coal and cinders might fall and escape and ignite the trestle bridge, as set forth in subdivision (d) of the 7th paragraph of the complaint.

(e) It appearing that there was no testimony to prove or tending to prove that the defendants failed to properly inspect and repair, or failed to maintain in a safe, suitable and proper condition the said trestle and trestle bridge upon which plaintiff's intestate lost his life, or that there was any failure upon the part of the defendant company, its agents and servants, to inspect such trestle and trestle bridge, as set forth in subdivision (e) of the 7th paragraph of said complaint.

(f) It appearing that there was no testimony to prove or tending to prove that the defendants negligently, wantonly or wilfully ran and operated the first locomotive engine, to which the engine on which the plaintiff's intestate lost his life was attached, at a dangerous and reckless rate of speed, and without keeping and maintaining a proper lookout or giving any signal or warning by bell, whistle or otherwise, to plaintiff's intestate, or that such alleged negligence caused the engine, on which plaintiff's intestate was discharging his duty, to run into said burning trestle.

4. Except because the presiding Judge charged the jury, after stating to them that the relation which existed between the plaintiff's intestate and the defendant company was that of master and servant, and that the master must furnish a reasonably safe place, instrumentalities, tools and the like to the servant in the discharge of his duties as such servant; that "where it appears that the servant is injured by defective instrumentalities, machinery, places or things of that kind, it is *prima facie* evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing means, places and instrumentalities in matters of that kind," the error being, it is submitted, that the master is not the absolute insurer of the safety of the servant, nor does any presumption as to the master's negligence arise from the fact of injury to the servant, nor does the burden of proof in an action by the servant against the master for an injury

from instrumentalities or machinery shift from the servant to the master, but the servant must prove the negligence of the master, as alleged in his complaint; that this is true both as to law prevailing in this State, and especially under the Employers' Liability Act of Congress, under which this action was brought and tried, and that said charge is an improper and erroneous construction of said act and deprives the defendants of their full right of defense under said act.

5. Except because the presiding Judge erred in charging the jury with reference to the duties and liabilities existing between a master and servant, as follows: "The master must use due care, the care that is due, to see that the place in which, the instrumentalities with which, the servant is to perform his duties as a servant, are safe and suitable. Where it appears that the servant is injured by and through defective instrumentalities, machinery or places and things of that kind, it is *prima facie* evidence of negligence on the part of the master, and the master assumes the burden of showing that he exercised due care in furnishing places, means, instrumentalities and matters of that kind," the error being—

(a) That no presumption of negligence on the part of the master arises from mere proof of injury to a servant through defective instrumentalities, machinery or places, nor it is *prima facie* evidence of negligence on the part of the master, nor does the burden of proof shift from the servant to the master to show that the master exercised due care in furnishing places, means, instrumentalities and matters of that kind.

(b) That such charge entirely excludes the element of knowledge upon the part of the master, and would make the master liable upon mere proof of defective instrumentalities, machinery or places without proof that the master knew of such defects or ought to have known of such defects in the exercise of reasonable care.

(c) That said charge was erroneous because it deprived the defendants of a substantial right of defense, arising under a proper construction of the act of Congress known as the Federal Employers' Liability Act, under which this case was brought and tried, and which was the sole and exclusive law upon the subject.

(d) That, as applied to the case before the jury, the above charge was a charge upon the facts, and was tantamount to telling the jury that in the event they found that there were defects in the trestle or in the instrumentalities of the defendant company's engines, and that by reason thereof Bennett lost his life, that they should find, and that the law was that this made out a case of negligence against the defendants, and that their verdict should be for the plaintiff, unless the defendants showed by the preponderance of the testimony that they had exercised due care in furnishing places, means, instrumentalities and matters of that kind, and that such charge was in violation of the Constitution of this State.

6. Except because the presiding Judge erred in refusing the motion of defendants for a new trial, which was made upon the ground that the verdict in the case was so excessive that it cannot be sustained under the facts or charge in the case as a verdict for compensatory damages under a proper construction of the Federal Employers' Liability Act, which limits the measure of damages to the actual pecuniary loss sustained by the beneficiaries under that act, the error being, as it is respectfully submitted:

(a) That there is no testimony tending to sustain a verdict for \$20,000, when the undisputed testimony of the plaintiff herself shows that her husband and intestate was earning only \$65 to \$75 per month at the time of his death, and it was an error of law, under the Federal Employers' Liability Act, under which the action was brought and tried, to allow such verdict to stand as a verdict for com-

REP.]

April Term, 1914.

pensatory damages, there being no testimony to support it for such an amount.

(b) That by the refusal to set aside such verdict and grant a new trial, the defendants have been deprived of a substantial right secured to them by said act of Congress, and it was error of law not to grant a new trial absolutely, when the undisputed evidence shows that such verdict was for a grossly larger sum than compensatory damages, or damages for the pecuniary loss sustained by the plaintiff, and the other beneficiaries under said Federal Employers' Liability Act, and when the provisions of that act contain the supreme and exclusive law that authorized or allowed an action for the recovery of damages to and by the plaintiff for the alleged wrongful death of her said husband and intestate; and when said act, as construed by the Federal Courts, limits the damages recoverable thereunder, in cases of wrongful death, to the actual pecuniary loss sustained by the beneficiaries for whose benefit an action is allowed by said act.

(c) That the verdict was clearly against the charge of his Honor to the jury, when applied to the undisputed facts, and it was error of law not to wholly set it aside and grant a new trial absolute.

Messrs. McDonald & McDonald, for appellant, cite: *Testimony showed action under Federal Employers' Liability Act*: 225 U. S. 477; 57 L. Ed. 1171. *That act governs*: 222 U. S. 444; 56 L. Ed. 257, 262; 222 U. S. 370; 56 L. Ed. 237; 223 U. S. 1; 56 L. Ed. 327, 347, 348, 349, 350. *Charge erroneous under the Federal decisions which should be followed*: 166 U. S. 617; 41 L. Ed. 1136. *Res ipsa loquitur repudiated*: 179 U. S. 658; 45 L. Ed. 361; 132 Fed. 593, 596; 142 Fed. 320; 114 Fed. 737; 80 Fed. 865; 139 Fed. 737; 138 Fed. 195; 88 Fed. 462; 98 Fed. 192. *Proof necessary to show master knew of defect in machinery*: 4 Thomp. Neg. 3864, 4362; 2 Thomp. Neg.

1053; 6 Thomp. Neg. 4362, 7528, 7529; 1 Labatt Master and Servant, sec. 119-121, 128-133, 832-838; 3 Elliott Evidence, sec. 2519; notes 6 L. R. A. (N. S.) 345; 41 L. R. A. 47, 48, 52; 175 U. S. 658; 45 L. Ed. 364; 41 L. Ed. 1136; 166 U. S. 617; 133 Fed. 61; 110 Fed. 674; 200 U. S. 480; 50 L. Ed. 584. *Charge on facts*: 76 S. C. 49; 55 S. C. 179; 66 S. C. 482; 78 S. C. 103; 79 S. C. 120; 83 S. C. 56; 87 S. C. 190; 89 S. C. 492, 140; 91 S. C. 203. *Error not to grant new trial for excessive verdict*: 16 S. C. 14; 19 S. C. 491. *Measure of damages*: 15 So. 876; 9 So. 870, 872, 873; 40 So. 280, 289, 290; 227 U. S. 192, 195, 196; Patterson Ry. Accident Law 401; Tiffany, Death by Wrongful Act, 158, 160-162; 227 U. S. 225; 62 Am. St. Rep. 132; 53 Am. St. Rep. 611; 12 Am. St. Rep. 380.

Mr. E. J. Best, for respondent, cites: *Testimony admissible*: 91 U. S. 454. *Burden of proof*: 6 Peters 312; 75 S. C. 402; 184 U. S. 173; 22 Sup. Ct. Rep. 340; 191 U. S. 90-93. *Procedure and practice*: 76 S. E. 212. *Master's knowledge of defects*: 35 S. C. 409. *Measure of damages*: 227 U. S. 192, 196, *et seq.*

September 15, 1913.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This was an action brought in the Court of Common Pleas by the plaintiff to recover \$75,000 damages on account of the alleged negligent, reckless, and wilful killing of her husband, Luther W. Bennett, while he was engaged in the employment of the defendant as a locomotive fireman. The action is brought for the benefit of plaintiff and her three infant children. The case was heard before his Honor, Judge Sease, and a jury at September term of the Court, for Fairfield county, 1912, and resulted in a verdict for the plaintiff for \$25,000. A motion for a new trial was thereupon made, which was granted, unless the plaintiff would

REF.]

April Term, 1914.

remit \$5,000 of the verdict. The remittitur was thereafter made. Judgment entered therein, and appeal was made therefrom, and appellants by six exceptions ask for reversal. The exceptions should be set out in the report of the case.

Exceptions 1 and 2 allege error on the part of his Honor in the exclusion of the testimony of the witness, W. H. Green, on cross-examination, and admitting over objection the testimony of the witness, W. O. Summers. As

1, 2 to the first exception, which imputes error to his

Honor in excluding the question and answer of the witness, Green, on cross-examination, whether he considered McAlister, the engineer in charge of the train on which plaintiff's intestate was killed, one of the most careful engineers of the defendants, it is overruled as being without merit. The question for the jury was not to determine what the engineer's general reputation was, but what his conduct was on the particular occasion—whether or not at this particular occasion he was guilty of any negligence or dereliction of duty. As to exception 2 in imputing error to his Honor in allowing witness, Summers, to testify that he saw places where fire had been dropped about two miles from the trestle bridge, which was on fire, on the ground that the same was incompetent and irrelevant, this exception is overruled. It was competent to go to the jury for them to determine how the fire originated. It was discovered immediately after one of defendant's locomotive engines had passed over the bridge in question, and it was a question for the jury to determine how crossties and bridge caught fire and burned. This testimony tended to elucidate how and by what means the fire originated which destroyed the trestle, and his Honor's ruling is sustained in the case decided by the Supreme Court of the United States of *Grand Trunk Ry. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356. This exception is overruled.

The third exception alleges error on the part of his Honor in refusing to grant the motion for nonsuit. The law is

so well settled that there is no error in refusing a motion of nonsuit, if there is any competent evidence at all to

3 sustain the allegations of the complaint that quotation of authority is unnecessary under such circumstances, the case must go to the jury. There was sufficient evidence in this case to carry the case to the jury, and his Honor committed no error in so holding. This exception is overruled.

Exceptions 4 and 5 allege error on the part of his Honor in his charge to the jury, said error being in charging the jury that proof of injury to a servant by defective machinery is *prima facie* evidence of negligence

4, 5 on the part of the master, it being alleged, among other things, that such charge deprived the defendants of a substantial right of defense arising under a proper construction of the act of Congress, known as the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), and also upon the ground that such a charge was in violation of the Constitution of this State as a charge on the facts. We do not think the charge of the Circuit Judge, to the effect that the proof of injury to a servant by defective machinery is *prima facie* evidence of negligence on the part of the master, was erroneous, and not in harmony with the Federal decisions, when his whole charge is considered. By reference to his charge as a whole the jury could not have inferred that the plaintiff could recover, unless she showed affirmatively by the burden of proof on the part of the plaintiff that the deceased's injuries were caused by the master's negligence. The Federal Employers' Liability Act is general in its terms, and makes no specific regulation as to the quantity, quality, and methods of proof of negligence, and, in the absence of any such regulation, will conform as near as possible to the State law in the manner and mode of trial and the rules of pleading, evidence, and law applicable thereto as was

REF.]

April Term, 1914.

said by the Supreme Court of North Carolina in *Fleming v. Norfolk Southern Ry. Co.*, 160 N. C. 196, 76 S. E. 212: "The Federal statute being thus general in its terms, and making no specific regulations as to the methods by which the fact of contributory negligence should be established, when the action is brought in the State Court, the procedure should conform as near as may be to that of the State law applicable, including the 'character of the action, the order and manner of trial, the rules of pleading and evidence.' etc. Hughes on Federal Procedure, p. 355; *Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229."

In *Green v. Railway Co.*, 72 S. C. 402, 403, 52 S. E. 47, 5 Ann. Cas. 165, the Court says: "When an injury to a servant is proved to result from a defective machine, the law puts upon the master the burden of proving that he used due care in making it safe." The Court further says: "It sometimes happens, however, that a description of the appliance and of the nature of the accident will indicate negligence by the master in providing appliances which he could not, as a reasonable man, regard adequate for the purpose for which they were used. But this is an inference from proof of the circumstances or physical facts as given in evidence, and not a presumption of law."

In *Hicks v. Sumter Mills*, 39 S. C. 39, 17 S. E. 509: "Proof of negligence is a condition precedent to the liability of the master. The proof may be either direct or circumstantial; but the plaintiff must assume the burden of furnishing evidence of one kind or the other."

An examination of the Judge's charge, as a whole, satisfies us that the language he used and issues he submitted to the jury to determine under the pleadings and evidence in the case was not prejudicial to the defendants and

6 not a charge on the facts. In charging what duty was imposed on the master, as to furnishing the servant with a place to work, instrumentalities, machinery.

appliances, etc., he correctly defined what the law was, as decided by this Court in a number of cases, and from nothing that he said could the jury infer that the master was an insurer of the safety of the servant. The charge of the Judge told the jury in substance that the plaintiff's case was to be made out by preponderance of the testimony, and in this connection used the following language: "The action here being tried is based entirely upon negligence, and, in order for the plaintiff to recover, the law imposes upon her the burden of proof of satisfying you by the preponderance or greater weight of the testimony that the defendants were negligent in the particulars described in the complaint. Every cause of action depends entirely upon the negligence alleged in the complaint, and, even if you were to find the defendants were negligent in some particulars, but were not negligent in the particulars mentioned in the complaint, then the plaintiff could not recover. In other words, in order to recover in this action, the plaintiff must establish by the preponderance of the evidence that the defendants were negligent in the particulars alleged in the complaint. No other negligence could be considered by you in making up a verdict, if you should find in favor of the plaintiff." During his Honor's charge he said this to the jury: "Now, as I sometimes tell juries, I cannot give you all the law in one proposition, therefore, you must take my charge as a whole. It is not intended to be contradictory—that is, one proposition contradict another. They are intended to qualify or modify one another. And, gentlemen, this is a long case. The principal points involved and the requests are very long. You will have to pay strict attention, and take my charge as a whole—the general charge, what was said by his Honor in charging defendants' request—we fail to see wherein his Honor said anything that was prejudicial to the defendants as complained of in this assignment of error, and this exception is overruled.

REF.]

April Term, 1914.

The errors complained of in the fifth exception are overruled, for the same reason that exception 4 is overruled.

The sixth exception complains of error on the part of the Judge in refusing a new trial absolute, on the ground that the verdict was excessive, and could not be sustained as compensatory damages under a proper construction of the Federal Liability Act, and against the law laid down by the Court when applied to the undisputed facts of the case.

We have already held that his Honor committed no error in refusing the motion for a nonsuit, and sending the case to the jury for their determination. The Judge, in charging the jury as to the measure of damages, and the mode of ascertaining the same, and what elements enter into the consideration of the same, could not have considered anything but pecuniary loss or damage. The Judge charged the written requests of defendants, as prepared by them and asked for, and adopted the exact language. They cannot now be heard to complain of getting what they asked for; but his Honor charged the correct law as laid down in the case of *Mich. Cent. R. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, by the Supreme Court of the United States, February 15, 1913:

"The word 'pecuniary' did not appear in Lord Campbell's Act, nor does it appear in our Act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage. A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, 'not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set pecuniary valuation.' Patterson, Railway Acci. Law, sec. 401. Nevertheless, the word as

judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training, and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.

“In *Tilley v. Hudson River R. Co.*, 24 N. Y. 471, and 29 N. Y. 252, 86 Am. Dec. 297, the Court stated that: ‘The word “pecuniary” was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though grievous and painful to be borne, cannot be measured or recompensed in money. It excludes, also, those losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of damages.’ To the same effect are the cases of *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 16 S. W. 924, which was followed by the Circuit Court of Appeals for the Eighth Circuit in *Atchison, T. & S. F. R. Co. v. Wilson*, 1 C. C. A. 25, 4 U. S. App. 25, 48 Fed. 57; *Lett v. St. Lawrence & O. R. C.*, 11 Ont. App. Rep. 1; *Penn. R. Co. v. Goodman*, 62 Pa. 332; *Louisville, N. A. & C. R. Co. v. Rush*, 127 Ind. 545, 26 N. E. 1010; *Tiffany, Death by Wrongful Act*, secs. 154 to 162, inclusive; *Patterson, Railway Acci. Law*, secs. 401-406.

“No hard and fast rules by which pecuniary damages may in all cases be measured is possible. In *Lett v. St. Lawrence & O. R. C.*, cited above, it was said, in the opinion of Patterson, J. A., after a review of all the English cases construing the act of Lord Campbell: ‘That there is through them all the same principles of construction applied to the statute. Each fresh state of facts as it arose was dealt with, and furnished a further illustration of the working of the act. The party claiming was held to be entitled or not to be entitled, the scale of compensation acted upon

REF.]

April Term, 1914.

by the jury was approved or disapproved, in view of the immediate circumstances; but in no case has it been attempted to decide by anticipation what are the limits beyond which the benefits of the statute cannot be claimed.' The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, 'according as the action is brought for the benefit of the husband, wife, minor child, or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.' Tiffany, Death by Wrongful Act. secs. 158, 160-162.

"The Court below instructed the jury that they could not allow damages for the grief and sorrow of the widow, or as a 'balm to her feelings.' They were directed to confine themselves to a proper compensation for the loss of any pecuniary benefit which would reasonably have been derived by her from the decedent's earnings. The Court did not stop there, but further instructed the jury that: 'In addition to that, independent of what he was receiving from the company, his employer, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experiences as men, and measure as far as you can what it would have reasonably been worth to Mrs. Wisemiller in dollars and cents to have had during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband.' *Vreeland v. Michigan Cent. R. Co.* (C. C.), 189 Fed. 496. This threw the door open to the widest speculation. The jury was no longer confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way. A minor child sustains a loss from the death of a parent, and particularly of a mother, altogether different from that of a wife or husband

from the death of the spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation, and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectual, moral, and physical training, such as, when obtained from others, must be for financial compensation. In such a case it has been held that the deprivation is such as to admit of definite valuation, if there be evidence of the fitness of the parent, and that the child has been actually deprived of such advantages. *Tilley v. Hudson River R. Co.* and *Lett v. St. Lawrence & O. R. Co.*, both cited above. If the case at bar had been of such character, the loss of 'care and advice' might have been a proper matter for compensation.

"Neither 'care' nor 'advice,' as used by the Court below, can be regarded as synonymous with 'support' and 'maintenance,' for the Court said it was a deprivation to be measured over and above support and maintenance. It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements 'care and advice.' But there was neither allegation nor evidence of such loss of service, care, or advice, and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial valuation of such 'care and advice from their own experience as men.' These experiences, which were to be the standard, would, of course, be as various as their tastes, habits, and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband. In this part of the charge the Court erred. The assignments of error are otherwise overruled. But for this

REP.]

April Term, 1914.

error the judgment must be reversed, and a new trial ordered."

There was sufficient testimony to sustain the verdict, and it was within his Honor's discretion to grant or refuse a new trial. This exception is overruled.

Judgment affirmed.

MR. CHIEF JUSTICE GARY and MR. JUSTICE HYDRICK concur.

MR. JUSTICE FRASER. I cannot concur in the result in this case. Ordinarily this Court has no jurisdiction to consider the amount of the verdict in damage cases. This is an action under the Federal statute, and the Supreme Court of the United States in *Michigan Central Railroad Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417 (Feb. 15, 1913), construed the statute and held that the recovery is confined to the pecuniary loss alone, and that the pecuniary loss is to be determined by the allegations of the complaint and the evidence in the case. The only evidence of pecuniary loss in this case is the wages of the deceased. The wages did not exceed \$900. There was no other evidence of pecuniary loss. The loss of \$900 per annum is not a basis of a judgment for \$20,000. There may be undisclosed circumstances which would render the verdict entirely proper. Under the *Vreeland* case the circumstances must be alleged and proved. No evidence is a question of law. I find no evidence upon which this judgment for \$20,000 can be sustained under the *Vreeland* case. The Court says in the *Vreeland* case, 227 U. S., at page 74. 33 Sup. Ct., at page 197. 57 L. Ed. 417: "It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that

service might include as elements 'care and advice.' But there was neither allegation nor evidence of such loss of service, care, or advice; and yet, by the instruction given, the jury was left to conjecture and speculation. They were told to estimate the financial value of such 'care and advice from their own experiences as men.' These experiences, which were to be the standard, would, of course, be as various as their tastes, habits, and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband. In this part of the charge the Court erred. The assignments of error are otherwise overruled. But for this error the judgment must be reversed, and a new trial ordered."

The only difference is that in the Vreeland case damages, which were discretionary, were allowed in the charge and here they were allowed in the judgment. It is the judgment that counts. For these reasons I cannot concur.

MR. JUSTICE GAGE was not on the bench when this case was decided.

Note.—On writ of error, the United States Supreme Court affirmed the judgment of the State Court in case of *Southern Railway Co. v. Bennett*, 233 U. S. 81, the opinion of that Court being delivered by Mr. Justice Holmes as follows:

This is an action under the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, for causing the death of the plaintiff's intestate. The plaintiff got a verdict for \$25,000, on which the Court ordered judgment upon the plaintiff's remitting \$5,000. Exceptions were taken, but the judgment was affirmed by the Supreme Court of the State, *supra*. 79 S. E. Rep. 710. The exceptions related to the instructions of the Court on the matter of liability and to the entering of judgment upon a verdict alleged to be excessive. As to rulings of the former class we have

REP.]

April Term, 1914.

indicated that when the statute is made a ground for bringing up ordinary questions of negligence we shall deal with them in a summary way and usually content ourselves with stating results. Whether such questions are open in a case coming from a State Court we need not decide, as, if open, they can be disposed of in a few words.

The defendant was killed by the falling of his engine through a burning trestle bridge. There was evidence tending to show that the trestle was more or less rotten, that the fire was caused by the dropping of coals from an earlier train and that the engine might have been stopped had a proper lookout been kept. The first complaint is against an instruction to the effect that, if a servant is injured through defective instrumentalities, it is *prima facie* evidence of the master's negligence and that the master "assumes the burden" of showing that he exercised due care in furnishing them. Of course, the burden of proving negligence in a strict sense is on the plaintiff throughout, as was recognized and stated later in the charge. The phrase picked out for criticism did not controvert that proposition, but merely expressed in an untechnical way that if the death was due to a defective instrumentality and no explanation was given, the plaintiff had sustained the burden. The instruction is criticised further as if the Judge had said *res ipsa loquitar*—which would have been right or wrong according to the *res* referred to. The Judge did not say that the fall of the engine was enough, but that proof of a defect in appliances which the company was bound to use care to keep in order and which usually would be in order if due care was taken, was *prima facie* evidence of neglect. The instruction concerned conditions likely to have existed for some time (defective ashpan or damper on the engine and rotten wood likely to take fire), about which the company had better means of information than the plaintiff, and concerning which it offered precise evidence, which, however, did not satisfy the jury. We should

not reverse the judgment on this ground, even if an objection was open to an isolated phrase to which no attention was called at the time.

The supposed error most insisted upon is the entering of judgment upon a verdict said to be manifestly excessive. It is admitted that the Judge charged the jury correctly, according to principles established by *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, but it is thought to be apparent as matter of law that the jury found more than the charge or the law allowed. The argument is this: The deceased was making not more than \$900 a year and the only visible ground of increase was the possibility that he might be promoted from fireman to engineer, with what pay was not shown. He could not have given more than \$700 a year to his family. His expectation of life was about thirty years by the tables of mortality. Therefore, at the legal rate of interest the income from \$10,000 for thirty years was all that the plaintiff was entitled to, whereas, she was given the principal of \$20,000 out and out. It may be admitted that if it were true that the excess appeared as matter of law; that if, for instance, the statute fixed a maximum and the verdict exceeded it, a question might arise for this Court. But a case of mere excess upon the evidence is a matter to be dealt with by the trial Court. It does not present a question for re-examination here upon a writ of error. *Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387; *Herencia v. Guzman*, 219 U. S. 44, 45, 31 Sup. Ct. 135. The premises of the argument for the plaintiff in error were not conclusive upon the jury, and although the verdict may seem to us too large, no such error appears as to warrant our imputing to Judge and jury a connivance in escaping the limits of the law.

Judgment affirmed.

REF.]

April Term, 1914.

8648

VARNVILLE FURNITURE CO. v. CHARLESTON & W. C. RY. CO.

(79 S. E. 700.)

CARRIERS. INTERSTATE COMMERCE. VALIDITY OF STATE LEGISLATION.
LOSS OR DAMAGE TO GOODS. DAMAGES. PENALTIES FOR DELAYED
SETTLEMENT OF CLAIM. CONSTITUTIONAL LAW.

1. Civ. Code 1912, sec 2573, providing that every claim for freight overcharged or for loss of or damage to property while in the possession of common carriers shall be adjusted and paid within 80 days in case of shipments wholly within the State, and within 40 days in case of shipments from without the State, and that failure to adjust and pay such claims within such periods shall subject the common carrier so failing to a penalty of \$50, does not unlawfully regulate or unreasonably burden interstate commerce, and is valid in the absence of legislation by Congress on the same subject.
2. Such section does not deprive carriers of their property without due process of law, or deny to them the equal protection of the laws.
3. The Carmack amendment to the interstate commerce law (Act June 29, 1906, c. 3591, sec. 7, pars. 11, 12, 84 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]), which provides that any common carrier receiving property for interstate transportation shall issue a receipt or bill of lading therefor, and shall be liable to the holder thereof for loss, damage, or injury to such property caused by it or any connecting carrier, does not defeat the recovery of penalties under Civ. Code 1912, sec. 2573, for the failure of a carrier to adjust and pay claims for overcharges of freight or loss of or damage to property promptly, where such penalties were incurred prior to its enactment, even if section 2573 is superseded and annulled by that amendment.
4. Civ. Code 1912, sec 2573, requiring carriers to adjust and pay claims for overcharges of freight, or for loss of or damage to property while in its possession within 30 days in case of shipments wholly within the State, and within 40 days in case of shipments from without the State, and imposing a penalty of \$50 for each failure to adjust and pay a claim within the period specified, is not inconsistent with, and was not superseded by, the Carmack amendment to the interstate commerce law (Act June 29, 1906, c. 3591, sec. 7, pars. 11, 12, 84 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]), which provides that common carriers receiving property for interstate transportation shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or any connecting carrier, that no contract, receipt, etc., shall exempt the carrier from the liability thereby imposed, but that nothing therein shall deprive

any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law, and that such carrier may recover from the carrier on whose line the loss occurred the amount it may be required to pay, since that amendment applies only to the subject of liability on contracts, while section 2573 applies to the entirely different subject of settlement of the claims of shippers, and hence, Congress not having acted on the subject covered by section 2573, that section is valid as applied to interstate commerce.

5. The authority of Congress to regulate interstate and foreign commerce is supreme and unlimited except by the Federal Constitution, and when Congress legislates upon any particular subject of such commerce, all conflicting State laws, whether statute or common law, affecting the same subject are thereby superseded; but, in the absence of such legislation, the police power of the State remains unimpaired.
6. There is no conflict, as to the carrier against which actions shall be brought, between Civ. Code 1912, sec. 2573, imposing a penalty for the failure of carriers to pay claims for overcharges of freight or for loss or damage to property within periods therein specified, and the Carmack amendment to the interstate commerce law (Act June 29, 1906, c. 3591, sec. 7, pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1807]), which requires common carriers receiving property for interstate transportation to issue a receipt or bill of lading therefor, and making such carriers liable to the holder thereof for any loss, damage, or injury to such property caused by it or any connecting carrier, and providing that nothing therein shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law, since, conceding that the proviso saves only remedies under existing Federal laws, the amendment does not limit the remedy of the holder of the bill of lading to an action against the initial carrier, as at the time of its enactment such holder, under the law as it then existed and was administered by the Federal Courts, had a right of action against the carrier actually causing the loss or damage, and, moreover, section 2573 does not require all actions to be brought against the terminal carrier.
7. The provision of the Carmack amendment to the interstate commerce law (Act June 29, 1906, c. 3591, sec. 7, pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1807]), that nothing in that section shall deprive any holder of a receipt or bill of lading issued by a common carrier of any remedy or right of action which he has under existing law continues all rights and remedies for the redress of same specific wrong or injury, whether given by the interstate commerce act, by State statute, or common law, not inconsistent with the rules and regulations prescribed by that act.

REF.]

April Term, 1914.

Before MEMMINGER, J., Hampton, December, 1912.
Affirmed.

The facts are stated in the opinion. Action by the Varnville Furniture Company against the Charleston & Western Carolina Railway Company. Judgment for plaintiff, defendant appeals.

Mr. F. B. Grier, for appellant, submits: *The commerce act of Congress as amended by act of June 29, 1906, is exclusive of all State legislation, regulation or policy, as applied to an interstate shipment, and renders null and void the penalty act of the State of South Carolina, of February, 1903, as amended February 15th, 1910, and cites: 219 U. S. 186; 55 L. Ed. 167, 178, 182; 26 Stats. 717, 719 and 720; 223 U. S. 1; 56 L. Ed. 327, 348; 227 U. S. 59; 54 L. Ed. 417; 226 U. S. 491; 222 U. S. 424; 56 L. Ed. 257, 261; 226 U. S. 426. Liability for loss: 92 S. C. 361; 91 S. C. 380.*

Mr. J. W. Vincent, for respondent, cites: 58 S. E. 927; 216 U. S. 122.

September 15, 1913.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

Plaintiff recovered judgment against defendant in a magistrate's Court for \$14.75 damages done to a shipment of furniture, while in defendant's possession in this State, and \$4.60, overcharges in the freight collected by defendant thereon, and \$50, the penalty allowed by statute (Civ. Code, 1912, section 2573), for the failure of defendant to pay plaintiff's claim for said damages and overcharge within 40 days after the filing thereof with defendant's agent. The initial carrier, the Southern Railway Company, received the shipment at High Point, N. C., to be transported over its

own and connecting lines and delivered to plaintiff at Varnville, S. C., and issued its usual bill of lading therefor. Defendant received the shipment from the Southern Railway Company at Allendale, S. C., and delivered same to plaintiff at destination in a damaged condition. The Circuit Court affirmed the magistrate's judgment.

The only question made in the Courts below and brought here by the grounds of appeal is that the statute above cited, under which defendant was penalized for its failure to pay plaintiff's claim within the time required, is void, as applied to interstate commerce, because: (a) It unlawfully regulates and unreasonably burdens the same; and (b) it deprives defendant of its property without due process of law, and denies to it the equal protection of the laws; and (c) it is in conflict with that provision of the Federal statute regulating interstate commerce known as the Carmack amendment (Act June 29, 1906, c. 3591, sec. 7, pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1308]).

The learned counsel for appellant admits that the first and second grounds above stated have been foreclosed by the decisions of this Court which have been affirmed by the

Supreme Court of the United States in *A. C. L. R.*

1, 2 *Co. v. Mazursky*, 216 U. S. 122, 30 Sup. Ct. 378, 54

L. Ed. 411, in which the validity of the statute now under consideration was affirmed. He contends, however, that the third ground was not involved in any of those cases, and that the effect of the Federal statute above referred to, as it has been interpreted and applied in recent decisions of the Federal Supreme Court, has been to supersede and annul the State statute.

It has been said that the delicts upon which the penalties were inflicted in the *Mazursky* case, and the others decided with it, occurred prior to the adoption of the Carmack amendment. As to that matter, the reports of those

3 cases (except the *Carl* case) are silent. But, if the fact be as stated by appellant's counsel, it is true that

REP.]

April Term, 1914.

the Federal statute would not have defeated the recovery of penalties incurred prior to its enactment. *Yazoo etc. R. Co. v. Greenwood Grocery Co.*, 227 U. S. 1, 33 Sup. Ct. 213, 57 L. Ed. 389, decided January 20, 1913.

But the arguments in the Supreme Court of the United States in the Mazursky case show that the point was made and pressed upon the attention of the Court that, if the State ever had power to enact this statute, it was
4 valid only until Congress should take action upon the same subject, and that Congress having taken such action, by the passage of laws regulating interstate commerce in great detail, it had thereby excluded or superseded the power of the State. At the time those cases were argued, the Carmack amendment had been on the statute books over three years; and, if it had the effect which is now claimed for it, it is strange that it was not mentioned either by counsel who argued the cause or by the Court in its opinion in disposing of the contention above stated, as was done in the Greenwood Grocery Company's case above cited, with regard to a similar effect given to the provisions of the Hepburn act. The omission points with force to the conclusion that it was not supposed, either by counsel or by the Court, to have any bearing upon the point at issue. Because, even though for the reason above stated it could not have controlled the decision, yet it would almost certainly have been advanced as an argument tending to show the intention of Congress to take possession of the field covered by the State statute. Besides this, the Mazursky case has been cited several times by the Supreme Court of the United States in cases subsequently decided, which involved the superseding effect of the provisions of the Federal statute regulating interstate commerce upon conflicting State laws, without any intimation that its authority is limited by the fact suggested. On the contrary, in *Southern Ry. Co. v. Reid*, 222 U. S. 436, 32 Sup. Ct. 140, 53 L. Ed. 260, in answering the contention, which was based upon the author-

ity of the Mazursky case and the James case, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, that the North Carolina statute under consideration was a valid exercise of the police power of the State, the Court said: "In those cases, and in the later case of *Western U. Tel. Co. v. Commercial Mill Co.*, 218 U. S. 406, 31 Sup. Ct. 49, 54 L. Ed. 1088 (36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815), the principle is expressed that 'there are many occasions where the police power of the State can be properly exercised to insure a faithful and prompt performance of duty within the limits of the 'State upon the part of those engaged in interstate commerce.' Such exercise of power, it was further said, was in aid of interstate commerce, and, although incidentally affecting it, did not burden it. But the facts of those cases distinguish them from the case at bar, and make their principle inapplicable. In the telegraph company cases, there was a failure to transmit or deliver telegrams, in violation of the duty so to do imposed by particular State statutes. In the railroad case, a statute of the State of South Carolina which required carriers to settle within a specified time claims for loss of or damage to freight while in their possession within the State was sustained against the objection that it was an interference with interstate commerce. *In none of the cases, however, was there any Federal legislation upon the subject involved, and in all of them such circumstance was stated as an element of decision.* The circumstance is important, and we are brought to the inquiry whether it exists in the present case." (Italics added.) It appears, therefore, that, even as late as the decision of the Reid case, which was filed in January, 1912, the Court had not discovered that there was any conflict between the Carmack amendment and this statute, the validity of which was affirmed in the Mazursky case upon the ground of the absence of "*any Federal legislation upon the subject involved.*"

REP.]

April Term, 1914.

But, treated as an open question, the conclusion is inevitable that there is no such conflict. We wish to make it clear at the outset that we concede that the authority of Congress to regulate interstate and foreign commerce is

5 supreme and unlimited, except by the Federal Constitution, and that, when Congress legislates upon any particular subject of such commerce, all conflicting State laws, whether statute or common law, affecting the same subject, are thereby superseded. On the other hand, we maintain that, in the absence of such legislation, the police power of the State remains unimpaired. These propositions are universally recognized, and they have been reaffirmed in the very latest decisions of the Supreme Court of the United States. *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; *Chicago etc. R. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; *Chicago etc. R. Co. v. Arkansas*, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. Ed. 290; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, decided January 6, 1913; *Simpson v. Shepherd*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511 (Minnesota rate case), decided June 9, 1913.

Let us inquire, then, what is meant by "the subject," when it is said that, when Congress has legislated upon or taken possession of "the subject," inconsistent State laws are superseded. This question was considered in *Southern Railway Co. v. Reid*, *supra*, where the Court said: "It is well settled that if the State and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised. The question occurs, to what extent and how directly must it be exercised to have such effect? It was decided in *Missouri P. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 29, Sup. Ct. 214, 53 L. Ed. 352, that the mere creation of the interstate commerce commission and the grant to it of a large measure of con-

trol over interstate commerce does not, in the absence of action by it, change the rule that Congress by nonaction leaves power in the States over merely incidental matters. 'In other words,' and we quote from the opinion, * * * 'the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. * * * *Until specific action* by Congress or the commission the control of the State over those incidental matters remains undisturbed.' The duty which was enforced in the State Court was the duty of a railroad company engaged in interstate commerce to afford equal local switching service to its shippers, notwithstanding the cars concerning which the service was claimed were eventually to be engaged in interstate commerce. This duty was declared * * * to be a common-law duty which the State might, 'at least, in the absence of congressional action, compel a carrier to discharge.' The principle of that case, therefor, requires us to find *specific action*, either by Congress in the interstate commerce act, or by the commission, covering the matters which the statute of North Carolina attempts to regulate." (Italics added.)

The same question is so clearly and fully discussed in *Savage v. Jones*, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182, and that case is so directly in point, that we quote from the opinion at length. After stating that the statute of Indiana, which was assailed in that case, and which was adopted in 1907, *after* the passage of the pure food and drugs act of Congress of June 30, 1906 (Act June 30, 1906, c. 3915, 34 Stat. 769 [U. S. Comp. St. Supp. 1911, p. 1354]), covered the same general subject, the Court pointed out that the provisions of the State statute upon which it was attacked as being in conflict with the food and drugs act were not included in the legislation of Congress, and on

REP.]

April Term, 1914.

that ground it was held that there was no conflict between the two, and that the State law was therefore valid. The Court said:

*"But this (the legislation of Congress) does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients (the thing prohibited by the act of Congress), and it may be quite another to give no information as to what the ingredients are (the thing required by the State statute). As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade-names which do not reveal the ingredients of the composition, and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the Federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain 'any added poisonous or deleterious ingredients,' shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture. * * * Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. Can it be said that Congress, nevertheless, has denied to the State, with respect to the feeding stuffs coming from another State and sold in the original packages, the power the State otherwise would have to prevent imposition upon the public by making a reasonable and nondiscriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial, it is not to be found in any express declaration to that effect. Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a State law enacted for these purposes. But it did not so declare. There is a proviso in the section*

defining misbranding for the purposes of the act, that 'nothing in this act shall be construed' as requiring manufacturers of proprietary foods which contain no unwholesome added ingredients to disclose their trade formulas, 'except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.' Section 8. We have already noted the limitations of the provisions referred to. And it is clear that this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions.

"Is, then, a denial to the State of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For when the question is whether a Federal act overrides a State law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the State law must yield to the regulation of Congress within the sphere of its delegated power. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (27 Sup. Ct. 350), 51 L. Ed. 553, 9 Ann. Cas. 1075; *Northern P. R. Co. v. Washington*, 222 U. S. 370, 32 Sup. Ct. 160 (56 L. Ed. 237); *Southern R. Co. v. Reid*, 222 U. S. 424, 436, 32 Sup. Ct. 140 (56 L. Ed. 257).

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the State. This principle has had abundant illustration. Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed.

REF.]

April Term, 1914.

688; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878; *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; *Crossman v. Lurman*, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401; *Asbell v. Kansas*, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101; *Northern P. R. Co. v. Washington*, 222 U. S. 370, 379, 32 Sup. Ct. 160, 56 L. Ed. 237, 240; *Southern R. Co. v. Reid*, 222 U. S. 424, 442, 32 Sup. Ct. 140, 56 L. Ed. 257, 262.

"In *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878, the Supreme Court of Kansas had affirmed a judgment against the railway company for damages caused by its having brought into the State certain cattle alleged to have been affected with Texas fever, which was communicated to the cattle of the plaintiff. The recovery was based upon a statute of Kansas which made actionable the driving or transporting into the State of cattle which were liable to communicate the fever. It was contended that act Cong. May 29, 1884, c. 60, 23 Stat. at L. 31 (U. S. Comp. St. 1901, p. 299), known as the animal industry act, together with act March 3, 1891, c. 544, 25 Stat. at L. 1044, appropriating money to carry out its provisions, and section 5258 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3564), covered substantially the whole subject of the transportation from one State to another State of live stock capable of imparting contagious disease, and therefore that the State of Kansas had no authority to deal in any form with that subject. The act of 1884 provided for the establishment of a bureau of animal industry, for the appointment of a staff to investigate the condition of domestic animals, and for the report upon the means to be adopted to guard against the spread of disease. Regulations were to be prepared by the commissioner of agriculture and certified to the executive authority of each State and territory. Special investigation was to be made for

the protection of foreign commerce, and the secretary of the treasury was to establish such regulations as might be required concerning exportation. It was provided that no railroad company within the United States, nor the owners or masters of any vessel, should receive for transportation, or transport, from one State to another, any live stock affected with any communicable disease, nor should any one deliver for such transportation, or drive on foot or transport in private conveyance from one State to another, any live stock knowing them to be so affected. It was made the duty of the commissioner of agriculture to notify the proper officials or agents of transportation companies doing business in any infected locality of the existence of contagion; and the operators of railroads, or the owners or custodians of live stock within such infected district, who should knowingly violate the provisions of the act, were to be guilty of a misdemeanor punishable by fine or imprisonment.

“The Court held that this Federal legislation did not override the statute of the State; that the latter created a civil liability as to which the animal industry act of Congress had not made provision. The Court said (169 U. S. 623, 624 [18 Sup. Ct. 492, 42 L. Ed. 878], *supra*): ‘*May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress?*’ This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, *unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together*. *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. Ed. 243, 247. * * * Whether a corporation transporting, or the person causing to be transported, from one State to another cattle of the class specified in the Kansas statute should be liable in a civil action for any damages

sustained by the owners of domestic cattle by reason of the introduction into their State of such diseased cattle is a subject about which the animal industry act did not make any provision. That act does not declare that the regulations established by the department of agriculture should have the effect to exempt from civil liability one who, but for such regulations, would have been liable either under the general principles of law or under some State enactment for damages arising out of the introduction into that State of cattle so affected. And, as will be seen from the regulations prescribed by the secretary of agriculture, that officer did not assume to give protection to any one against such liability.'

"In *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108, the question arose under a statute of Colorado which had been passed to prevent the introduction into the State of diseased animals. The statute made it a misdemeanor for any one to bring into the State between April 1st and November 1st any cattle or horses from a State, territory, or county south of the thirty-sixth parallel of north latitude, unless they had been held at some place north of that parallel at least 90 days prior to importation, or unless the owner or person in charge should procure from the State veterinary sanitary board a certificate, or bill of health, to the effect that the cattle or horses were free from all infectious or contagious diseases, and had not been exposed thereto at any time within the preceding 90 days. The expense of any inspection in connection therewith was to be paid by the owner.

"The plaintiff in error had been convicted of bringing cattle into the State in violation of the statute. There was no proof in the case that the particular cattle had any infectious or contagious disease, but it did appear that they were brought from Texas, south of the thirty-sixth parallel, without being held or inspected as the statute required. Its provisions were ignored altogether as invalid legislation.

When the plaintiff in error refused to assent to the State inspection he showed to the authorities a certificate signed by an assistant inspector of the Federal bureau of animal industry, who certified that he had carefully inspected the cattle in Texas and found them free from communicable disease. It was insisted that the statute of Colorado was in conflict with the animal industry act of Congress, but the Court sustained the State law for the reason that, although the two statutes related to the same general subject, they did not cover the same ground, and were not inconsistent with each other.

"The Court thus emphasized the general principle involved (187 U. S. 148, 23 Sup. Ct. 96, 47 L. Ed. 108, *supra*): *'It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police power of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This Court has said—and the principle has often been reaffirmed—that "in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be so direct and positive, so that the two acts should not be reconciled or consistently stand together."*'

 (Italics added.)

In each of the cases hereinbefore cited, the Court holds that the police power of the State still exists unimpaired, except in so far as laws adopted thereunder may conflict with the legislation of Congress upon the same subject. Therefore we cannot accept as sound the contention of appellant's counsel that the Supreme Court of the United States has held that the act to regulate commerce "was intended to cover and regulate the entire subject of interstate commerce, leaving nothing to the State, either by way of legislation, policy, or regulation." To sustain that contention, he cites the following from the Croninger case: "Almost every detail of the subject is covered so completely

REP.]

April Term, 1914.

that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all State regulation with reference to it." When the language quoted is given its proper setting, and read in connection with the context, it clearly appears that "the subject" referred to was not the whole subject of interstate commerce, but the limited subject "*of liability of the carrier under a bill of lading which he must issue,*" as required by the Carmack amendment. The whole paragraph from which the quotation is taken reads as follows: "That the legislation (the Carmack amendment) supersedes all the regulations and policies of a particular State *upon the same subject* results from its general character. *It embraces the subject of the liability of the carrier under a bill of lading which he must issue,* and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all State regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon *the subject of such contracts.* But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist." (Italics added.) Read as a whole, the passage shows clearly that "the subject" which the Court had in mind was "the subject of such contracts;" that is, of liability on contracts which any carrier receiving property for interstate transportation is required to issue.

Having seen what the subject of the Carmack amendment is, let us examine the State statute to see what subject is dealt with by it, and thereby determine whether they cover the same subject, and whether there is any conflict between them. The State statute merely penalizes the failure of carriers to perform a common-law duty—namely, the duty to make reasonably prompt settlement of the claims of ship-

pers for loss of or damage to property while in their possession. The performance, or the failure of performance, of that duty has nothing whatever to do with the liability of the carrier under the contract of shipment. The statute does not attempt to impose, increase, or diminish that liability, or to affect it in any way whatever. It merely says that, assuming the liability to exist, the carrier should discharge it with reasonable promptness, and penalizes his failure to do so. With as much reason could it be said that a statute which imposes the costs of the action upon the losing party imposes or affects in any way the liability upon which the action is predicated. The two things are separate and distinct. The payment of costs is imposed as a penalty for failure to pay the debt without suit, and the payment of the penalty is imposed for like reason—the failure to pay a just claim within a reasonable time, without compelling the shipper to resort to the Courts to collect it. Where no liability exists, no penalty can be recovered; and, unless the shipper recovers the full amount which he has claimed, he cannot recover the penalty. The carrier is therefore protected against being penalized for the failure to pay unjust or exorbitant claims.

We look in vain through the legislation of Congress to find any rule or regulation on the subject of the prompt settlement of such claims. By no sort of implication can that subject be brought within the provisions of the Carmack amendment. That it is one proper for the exertion of the State authority, in the absence of congressional action, is settled by the Mazursky case. The reason for the statute and the grounds upon which it should be sustained are set forth in that case and in the Seegers case, 73 S. C. 71, 52 S. E. 797, 121 Am. St. Rep. 921, and 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108. The annulling of it would leave shippers at the mercy of interstate carriers, and allow them to practically confiscate small claims for loss of or damage to property while in their possession; because, in the great

REF.]

April Term, 1914.

majority of cases, the amounts involved are too insignificant to justify the employment of legal counsel to collect them. That there was great abuse in that regard, and an evil which needed a remedy, is evidenced by the statute.

We shall next consider the decisions of the Supreme Court of the United States which are relied upon by appellant to show that the State statute conflicts with the legislation of Congress, and attempt to show that they cannot be so interpreted. The Carmack amendment reads as follows: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

This legislation was construed and applied in the case of *Adams Express Co. v. Croninger*, *supra*, in which the company was held liable in the State Court for the full value of a diamond ring, and interest thereon, to wit, \$137.52, notwithstanding a limitation of the company's liability, by stip-

ulation in the bill of lading, to the agreed value, to wit, \$50, when the shipper had obtained the lower of two alternative rates of transportation, which were based upon the value of commodities above and below \$50, which rates had been made and filed with the interstate commerce commission and duly published. The ruling of the State Court was based upon the State law, which declared void all contracts limiting the common-law liability of carriers. The Supreme Court of the United States held that the Carmack amendment indicated "a purpose to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular States." That being the purpose, all State laws conflicting therewith were necessarily superseded. As to the liability thereby imposed, the Court said: "The statutory liability, aside from responsibility for the default of a connecting carrier in the route, *is not beyond the liability imposed by the common law* as that body of law applicable to carriers has been interpreted by this Court, as well as many Courts of the States." (*Italics added.*) As the liability imposed (except that for the default of connecting carriers) is not beyond that imposed by the common law, it certainly cannot be said to cover the same field as the statute of this State, which imposed a liability unknown to the common law. We have heretofore pointed out the essential differences between the Federal and State law.

In *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683 (decided March 10, 1913), the principle of the Croninger case was reiterated, and, in addition, it was held that any valid limitation of liability stipulated for in the bill of lading for the benefit of the initial carrier and its connecting carriers inured to the benefit of each succeeding carrier in the route.

The case of *Missouri, K. & T. R. Co. v. Harriman Bros.*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690 (decided March 10, 1913), came within the principle of the Cronin-

ger and Carl cases, and it was further held, in that case, that a stipulation in the bill of lading limiting the time to 90 days within which an action could be brought against the carrier to enforce the liability incurred thereunder was reasonable and valid, and that it superseded State statutes which declared such a stipulation invalid, in so far as the same were applied to interstate shipments. In each of the foregoing cases, the subjects regulated by the State was embraced in the contract for interstate transportation, control of which had been assumed by Congress in the Carmack amendment.

The case of *Chicago etc. R. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 33 Sup. Ct. 174, 57, L. Ed. 284 (decided January 6, 1913), does not come under the Carmack amendment, but under section 1 of the Hepburn act, amending the original act to regulate commerce. In the Hardwick case, the State Court imposed upon a carrier a penalty provided by a statute of Minnesota for delay in furnishing cars to initiate an interstate shipment. The original act to regulate commerce declared that the term "transportation" should embrace all instrumentalities of shipment or carriage, and the Hepburn act declared that it "shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable requests therefor, and to establish through routes and reasonable rates applicable thereto." (Italics added.) The Supreme Court reversed the State Court, and held that "Congress has legislated concerning the *deliveries of cars* in interstate commerce by carriers subject to the act." Not only had the act of Congress

imposed upon such carriers the specific duty of furnishing cars for interstate shipments, but it had gone further and provided remedies and penalties for the violation of that duty. It necessarily followed that the State law was superseded because it covered the same field.

In the case of *St. Louis etc. R. Co. v. Edwards*, 227 U. S. 265, 33 Sup. Ct. 262, 56 L. Ed. 506 (decided February 24, 1913), the Court of Arkansas imposed upon an interstate carrier the penalty provided by what was called "the demurrage statute" of that State, because of a failure to make prompt delivery of freight on arrival at destination. The Supreme Court reversed the judgment, and held under the principle announced in the Hardwick case, that the subject of the *delivery* of interstate shipments is so far embraced in the provisions of the Hepburn act, above quoted, as to supersede the Arkansas statute, which dealt with the same subject. We fail to see wherein this State statute has anything whatever to do with contracts made by the initial carrier relative to its liability or that of its successors in the route for loss or damage to the property caused by it or them so as to bring it within the principles of the Croninger, Carl, and Harriman cases, or with the *receipt* or *delivery* of interstate shipments so as to bring it within the principles of the Hardwick and Edwards cases.

In this connection, we notice the statement in the argument of appellant's counsel that this Court held in the Charles case, 78 S. C. 36, 58 S. E. 927, 125 Am. St. Rep. 762, that "prompt delivery of goods" is the legal equivalent of "prompt settlement of proper claims for damages," and that the Supreme Court of the United States held the same in the Mazursky case. Counsel has evidently misunderstood the Court. The language used was: "The penalty imposed is for a delict of duty appertaining to the business of a common carrier, and in so far as it may affect interstate commerce, it is an aid thereto by its tendency to promote safe and prompt delivery of goods, or its legal equiv-

REF.]

April Term, 1914.

alent—prompt settlement of proper claims for damages.” From the context, it appears that the Court meant only that the effect of the statute was not to burden interstate commerce, but rather to benefit it, by stimulating carriers to take proper care of goods while in their custody, so that delivery thereof in good condition would be made, knowing that, if they failed in that duty, they would be under the compulsion of the statute to perform the alternate duty of making prompt settlement of proper claims therefor. The language of this Court above quoted, and much more of the opinion of this Court in the Charles case, was quoted in the opinion of the Supreme Court of the United States in the Mazursky case, but no comment was made upon this point, and it was not an element of decision.

Appellant's next contention is that the Carmack amendment conflicts with and supersedes the State statute, because it requires that all actions for loss of or damage to interstate shipments shall be brought against the
6 initial carrier, while the State statute requires that they shall be brought against the terminal carrier.

In this appellant has erroneously construed both the Federal and the State statute. The Federal statute does not limit the right or remedy of the holder of the bill of lading, in case of loss or damage, to an action against the initial carrier receiving property for interstate transportation. While it says that that carrier shall be liable, on the principle that succeeding carriers in the route are its agents, it does not say that it alone shall be liable, or that the holder of the bill of lading shall pursue that carrier only. On the contrary, the act expressly preserves the right of the holder of the bill of lading to pursue the carrier which actually caused the loss or damage, for it says: “Nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.” Certainly, under the law as it existed at that time, the holder of the bill of lading had a right of

action against the carrier which actually caused the loss or damage. In fact, prior to the Carmack amendment, as the result of the almost universal practice of carriers to limit their liability by stipulation in the bill of lading to loss or damage occurring on their own lines, that was practically the only right he did have, in case of loss of or damage to his goods in the course of interstate transportation; and the fact that he frequently found it very difficult, and sometimes impossible, to find out which one of the several connecting carriers was actually in default, and the expense and inconvenience of prosecuting his claim against a carrier in a distant State, were some of the reasons which led to the adoption of the Carmack amendment. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 200, 31 Sup. Ct. 164, 55 L. Ed. 180, 31 L. R. A. (N. S.) 7. To hold that the initial carrier alone is liable to the holder of the bill of lading would, in many cases, cause the very expense and inconvenience which the statute was designed, in part at least, to obviate. A consignee in South Carolina might be compelled to bring suit against the initial carrier in California to collect a claim on insignificant amount or abandon it, when the carrier whose default caused the loss or damage was at his door. Such a construction of the act would defeat one of its purposes. Why should the owner of the goods be compelled to sue the initial carrier, if he can prove that the terminal carrier lost or injured his goods, and what right has the carrier who lost or injured his goods to contend that he should not be held liable in an action by the owner? If the initial carrier is held on his statutory liability, the carrier in default is liable over to him. What difference can it make to the carrier who is ultimately liable whether he pays the damages to the owner of the goods or to the initial carrier?

It is argued, however, that in the Croninger case, the Supreme Court construed the proviso above quoted as preserving to the holder of the bill of lading only the rights or

REP.]

April Term, 1914.

remedies which he may have had under existing Federal law. Without conceding that the language of this Court, used in the connection in which it was, can be properly construed to so limit the effect of the proviso, it cannot be denied that, under the law, as it then existed and was administered by the Federal Courts, the holder of such a bill of lading did have a right of action against the carrier which actually caused the loss or damage. Referring to the language in the Croninger case, which is relied upon by counsel for appellant, the Court gave, as an instance of the rights preserved by the proviso, the then existing right of the holder of the bill of lading to a remedy against a succeeding carrier in default, in the following language: "One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former."

While the foregoing is sufficient to dispose of this contention, so far as it affects the decision of this case, it might not be amiss, in this connection, to say that the

remark of the Court which appellant relies upon was made in answering the contention in argument in that case that all rights and remedies under all existing laws, including State laws which were in conflict with the purpose and intent of the act, were preserved by the proviso. The Court pointed out the absurdity of that construction by showing that it would result in the destruction of the act by the proviso, and in the nullification by a conflicting State law of the regulation of a national subject by the supreme authority of Congress, and said, in answering that argument, that a more rational construction would be "to construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action." But that was far from saying that that was the proper construction, or the only one, to be given to the proviso. On

the contrary, the Court had already given the proviso the same construction which it had given a similar provision in the act of 1887, in the Abilene case, to wit, "that it was 'evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the interstate commerce act, or by State statute, or common law, *not inconsistent with the rules and regulations prescribed by the provisions of this act.*'" (Italics added.) By this language, the proviso was held to preserve rights and remedies for the redress of some specific wrong or injury given by State statute or the common law, *provided the same are not inconsistent with any rule or regulation prescribed by the act itself*, a construction which merely harmonizes the provisions of the act with its purpose.

Equally untenable is the construction put upon the State statute by the appellant—that it requires all actions to be brought against the terminal carrier. This Court has expressly held that the terms of the statute limit "the loss and damage which a carrier is required to adjust and pay for to that which befalls while the goods are in the possession of such carrier, and excludes the idea of liability for loss or damage to the goods while in the possession of another carrier." *Venning v. A. C. L. R. Co.*, 78 S. C. 56, 58 S. E. 983, 12 L. R. A. (N. S.) 1217, 125 Am. St. Rep. 768.

The judgment of the Circuit Court is affirmed.

MR. CHIEF JUSTICE GARY and MR. JUSTICE FRASER concur.

MR. JUSTICE WATTS, *dissenting*. This action was brought in the magistrate's Court to recover \$14.76 damages to a shipment of furniture, in transit, from High Point, N. C., to Varnville, S. C., and for \$5.25 overcharge in freight, and for \$50 penalty for failure to pay the claim in 40 days.

REF.]

April Term, 1914.

The defendant demurred to so much of the complaint as asked for penalty of \$50 on the grounds, in substance, that the statute under which this action is brought is unconstitutional because it amounts to a burden on and regulates interstate commerce, because it deprives the defendant of its property without due process of law, and because it deprives it of equal protection of the laws. The magistrate overruled the demurrer, and defendant answered, denying the allegations of the complaint, and the case was tried before the magistrate without a jury. From the testimony it appears that in the first week in March, 1912, the plaintiff ordered a carload of furniture from High Point, N. C., to be shipped to Varnville, S. C. The shipment was delivered to the Southern Railway Company, at High Point, N. C., to be transported over its line from High Point, N. C., to Allendale, S. C., and there delivered to the Charleston & Western Carolina, the defendant, at which point the defendant received the shipment and transported it to Varnville, S. C., and there made delivery to the plaintiff, the consignee and owner and holder of the bill of lading.

The evidence shows: That the furniture was damaged in transit, but whether on defendant's line or not it does not appear. At the trial the defendant asked the magistrate to hold that the claim for \$50 as a penalty as applied to an interstate shipment was a burden on interstate commerce. That the penalty act as applied to an interstate shipment was unconstitutional, null, and void. The magistrate refused to so hold, and gave judgment for plaintiff, for full amount claimed, and \$50 penalty. The defendant appealed to Circuit Court, and his Honor, Judge Memminger, affirmed the judgment of the magistrate's Court. The defendant appeals, and questions the correctness of his Honor's ruling. These exceptions question the validity of the penalty act of February 23, 1903 (24 St. at Large, p. 81), as amended February 19, 1910 (26 St. at Large, p. 719), on the ground that said act as applied to an inter-

state shipment is unconstitutional and in conflict with the due process clause and the commerce act of the Federal Constitution. That it is a regulation of interstate commerce, and it is in conflict with the act of Congress as amended June 29, 1906. These exceptions should be sustained. The recent decisions of the United States Supreme Court, the final arbiter in such matters, and by whose decisions this Court is bound, clearly establishes the propositions: First, legislation of the States in regulation of interstate commerce was permissive only, permission being implied by failure of Congress to legislate, but the permission has been taken away by recent Federal legislation, especially the Hepburn act, and the Carmack amendment. Second, the provision "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action he has under existing laws" refers to rights and remedies provided by Federal statutes, and necessarily excludes those provided by the State statutes. Third, the duties and liabilities of carriers in interstate commerce are provided by the Federal statute, and the regulations of the Federal statute supersede and annul all State statutes providing penalties for the failure to perform any duty or obligation incident to interstate commerce.

Transportation is declared by the Federal statutes to embrace all instrumentalities of shipment and carriage, including "all services in connection with the *receipt, delivery*, elevation and transfer in transit, ventilation and refrigeration, icing, storing and handling of property transported." The words italicized indicate the reason for holding that this case falls within the rule above set out, laid down by the Supreme Court of the United States in the following cases: *Chicago etc. Railroad Co. v. Hardwick Elevator Co.*, 226 U. S. 427, 33 Sup. Ct. 174, 57 L. Ed. 284; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314; *Kansas City, etc., Railroad Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683;

REP.]

April Term, 1914.

St. Louis etc. Railroad Co. v. Edwards, 227 U. S. 265, 33 Sup. Ct. 262, 57 L. Ed. 506; *M. K. & T. R. Co. v. Harriman Bros.*, 227 U. S. 667, 33 Sup. Ct. 397, 57 L. Ed. 690. These cases so fully and conclusively cover the principle involved that it seems clear to me that the judgment should be reversed.

MR. JUSTICE GAGE was not on the bench when this case was decided.

NOTE: This case has been carried on writ of error to the United States Supreme Court.

8675

EBERLE v. SOUTHERN RAILWAY CO.

(79 S. E. 792.)

CARRIER AND PASSENGER. MILEAGE TICKETS. APPEAL AND ERROR.
CHARGE. WAIVER. PUNITIVE DAMAGES.

1. Where defendant carrier, under schedules filed with the interstate commerce commission, sold a mileage ticket to plaintiff, providing that tickets issued in exchange for mileage coupons would be honored for continuous passage to destination when presented in connection with the mileage ticket without limitation as to time, it could not by filing new schedules, providing that mileage tickets so exchanged would be honored only for continuous passage to destination commencing on the date stamped on the back thereof, which date should be that on which the tickets were issued in exchange for coupons, change plaintiff's contract so as to limit the time of use of tickets issued on his book, and the fact that such tickets were good for transportation in accordance with plaintiff's contract did not constitute a discrimination in violation of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 U. S. Stat. 379 [U. S. Comp. St. 1901, p. 3154]).
2. Where plaintiff, in an action against a carrier for refusal to accept a mileage ticket for transportation, was entitled to a peremptory instruction that the ticket tendered was good, defendant was not prejudiced by an instruction that its agents could waive a stipulation in the contract with reference to limitation of tickets issued

on mileage and leaving it to the jury to say whether they had done so.

3. Though a tort-feasor is not conscious of an invasion of the rights of another, yet if a tort is committed in such a manner or under such circumstances that the jury may find that a person of ordinary reason and prudence would have been conscious of it as such, it warrants the infliction of punitive damages.

Before MEMMINGER, J., Hampton, December, 1912.
Affirmed.

Action by A. S. Eberle against the Southern Railway Company. From judgment for plaintiff, defendant appeals. The facts are stated in the opinion.

Mr. J. W. Manuel, for appellant, cites: *Punitive damages*: 29 S. C. 265; 69 S. C. 434; 48 S. E. 460; 90 S. C. 435; 73 S. E. 790; 75 S. E. 1018; 69 S. C. 434; 48 S. E. 460. *Lawful tariffs govern irrespective of contract*: 63 S. E. 528; 73 S. E. 1027; 73 S. C. 1020; 138 U. S. 98; 202 U. S. 242; 204 U. S. 426; 94 N. E. 906; 113 Pac. 433; 204 U. S. 449. *Carrier not estopped to deny the invalid contract*: 127 N. W. 543; 94 N. E. 906; 219 U. S. 467.

Messrs. J. W. Vincent and Geo. Warren, for respondent.

October 24, 1913.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

This appeal is from a judgment against defendant for damages for the unlawful and wanton invasion of the rights of the plaintiff, as a passenger, by one of defendant's ticket collectors. The action grew out of the following facts: On July 12, 1910, plaintiff purchased one of defendant's mileage tickets, the coupons of which were exchangeable for passage tickets, which, by the terms of the contract, were to be honored "when presented in connection with the

REP.]

April Term, 1914.

mileage ticket." This mileage ticket was issued in accordance with the schedule of rates which had been filed with the interstate commerce commission and published, and was in effect at that time. Thereafter, defendant filed with the commission a mileage ticket contract, wherein the requirement as to the exchange of mileage coupons for passage tickets and the use thereof was changed, so that such tickets would "be honored for continuous passage to destinations commencing on date stamped on back of such exchange tickets, which dates shall be the dates on which such tickets are issued in exchange for coupons." This modification of the previous tariff went into effect September 21, 1910, and was effective on May 19, 1911, when defendant's ticket collector refused to honor a passage ticket from Charlotte, N. C., to Columbia, S. C., which plaintiff had obtained, on October 15, 1910, by exchange of coupons from his mileage ticket, after the new mileage ticket contract had gone into effect. For reasons unnecessary to state, plaintiff decided not to use the ticket on the date of issue, which was stamped on the back of it. The ticket collector refused to honor it on the ground that it was out of date, passage not having been commenced on the date of issue.

Plaintiff testified, in substance: On deciding not to use ticket that day, went to defendant's agent at Charlotte and asked him to take it back and give me back the coupons; he refused, but said agent at Columbia would redeem ticket; saw agent at Columbia next day; said he had formerly redeemed such tickets, but had not done so for some time, but that it would be redeemed if sent to Atlanta office; asked him if I could ride on it, and he said, certainly, I could; on May 19, 1911, became passenger on defendant's road from Charlotte to Columbia, and presented this ticket to ticket collector, who refused to honor it, on the ground that it was out of date, and threatened to eject me unless I would pay fare in cash; he refused to hear or heed my explanation as to how I happened to have the ticket, and

as to what defendant's agents had told me, and insulted me by telling me that I might have stolen it, and that I was lying in what I was saying about it, and that he would eject me if I did not pay my fare; on my refusal to pay and threat to forcibly resist expulsion from train, he contemptuously told me that he would pay my fare, and make me a present of it. Under the circumstances, I paid my fare in cash.

It appears from some of the allegations of the complaint, and testimony elicited, and the argument of plaintiff's attorneys, that they sought to bring this case within the principles of *Smith v. Ry.*, 88 S. C. 421, 70 S. E. 1057, 34 L. R. A. (N. S.) 708. But that case was different from this in at least two material particulars: First, in that case no question of any departure from the tariff made and filed with the interstate commerce commission and published, as required by the act of Congress, or from the privileges therein, and thereby contracted for, was raised by pleadings or proof, or presented to the Circuit Court, and relied upon as a defense, and, therefore, no such question was properly before, or decided by, this Court. Second, the contract in that case provided that the mileage coupons would be honored in exchange for passage tickets, which would be issued "in accordance with special tariffs and circulars of instructions," and that provision was one of the grounds of decision, but it does not appear that the plaintiff's contract contained any such provision.

On the other hand, defendant's attorney contends that this case is within the act regulating commerce and the principles of those cases which hold that the carrier
1 cannot depart from the tariff filed and published,
as required by that act, and the privileges and facilities therein granted and allowed.

Defendant's contention that the filing of a subsequent tariff had the effect of cancelling and annulling the contract which it had made with the plaintiff is untenable. The

REP.]

April Term, 1914.

case of *Louisville etc. R. Co. v. Motley*, 31 Sup. Ct. 171, 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671. is relied upon to sustain that contention. But learned counsel has evidently overlooked the difference between the effect of an act of Congress and an act of the railroad company upon such contracts. In the *Motley* case, the Court held that an act of Congress, passed within the exercise of its constitutional power to regulate commerce, which made unlawful the contract which had theretofore been lawful, rendered it incapable of enforcement. But that is very different from holding that the railroad company can, by any act of its own, destroy the validity of its own valid contracts, such a proposition cannot be sustained upon reason or authority.

It is true that, when a schedule of rates has been filed and published, as required by the act, it has the force and effect of law, and, until changed in the manner prescribed by law, it cannot be departed from in favor of any passenger or shipper so as to give him any undue preference or advantage, or subject others to any unjust or unreasonable prejudice or disadvantage, or create any unjust discrimination. But it is equally true that, when a member of the public makes a contract with a carrier, which the act regulating commerce permits the carrier to make, and which is in accordance with the tariff in effect, when it is made, the carrier cannot, by any act of its own, destroy or impair the validity of such contract. To hold otherwise would violate the fundamental principles of law and justice. The contract which defendant made with the plaintiff, in selling him the mileage ticket, did not violate either the letter or the spirit of the interstate commerce law. The sale of such tickets is not only not prohibited by the act, but is authorized, in express terms, in section 22. (Act of Congress, Feb. 4, 1887, c. 104, 24 Stat. 387, U. S. Comp. Stats. 1901, p. 3170.) The authority to make such contracts carried with it, by necessary implication, the right

and duty to perform them according to their terms; and it is also implied that declaration of Congress that, in the making and performing of such contracts, no such discrimination would be created as the act was intended to prohibit.

In *Interstate Com. Com. v. Baltimore & O. R. Co.*, 145 U. S. 263, 12 Supt. Ct. 844, 36 L. Ed. 699, the Court affirmed the right of carriers to sell "party-rate" tickets at a lower rate than regular individual tickets, on the ground that it was not an unjust discrimination in favor of persons using them. That principle was reaffirmed in *Texas etc. R. Co. v. Interstate Com. Com.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940, and in *Interstate Com. Com. v. Alabama M. R. Co.*, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414.

In this case, no difference was made in plaintiff's favor in the rate. The only difference between plaintiff's contract and the one subsequently filed appears to be in the time when passage tickets must be used after having been issued. We are unable to see wherein carrying out the plaintiff's contract, as to that requirement, would have given him any such undue or unreasonable preference or advantage over other passengers as the act was intended to prevent.

Plaintiff's contract, having been made in accordance with and under the sanction of the law, was valid, and the subsequent filing and publication of a tariff containing a different contract cannot be allowed to have the effect of cancelling and annulling the exchange requirement of his contract and substituting for it the one subsequently filed and published. It would be as sound in principles to hold that the company could, by a subsequent tariff, cut down the time within which the mileage coupons in the ticket which it sold plaintiff could be used from one year to three months, and thereby confiscate those which had not been used at the end of three months, as to say that it could, in that way, destroy or impair the validity of that part of the contract

REP.]

April Term, 1914.

which provides that passage tickets obtained by exchange for coupons from the ticket will be honored at any time within the year, when presented with the mileage ticket.

This case does not fall within the principle of the Armour Packing Company's case, 209 U. S. 57, 28 Sup. Ct. 428, 52 L. Ed. 681, which dealt with a violation of the interstate commerce act by carrying out a contract for a rate for the transportation of property, after it had been changed by the filing and publication of a higher rate. The act not only does not sanction the making of such contracts, but, by necessary implication, forbids it; because, if allowed, they could be used as a means of creating and continuing the very discriminations and inequalities in rates which the act was intended to prevent, and thereby thwart its purpose. But the act expressly permits the sale of mileage, commutation and excursion tickets, and, as we have seen, the permission is tantamount to a declaration that no unjust discrimination will be wrought thereby, and carries with it the right and the correlative duty to perform such contracts according to their terms.

It appears, therefore, that the ticket tendered by plaintiff was good and should have been honored, not because of any supposed waiver of any stipulation of the contract by the defendant's agents, as plaintiff's counsel attempted to show, but because it was issued and presented in accordance with the terms of the contract. The Aldrich case, 95 S. C. 427, 79 S. E. 316, recently filed, and the cases therein cited, show clearly that plaintiff could have acquired no right by virtue of anything that either of defendant's agents told him. No statement which they, or either of them made to him gave his contract more validity or vitality than it already had.

Therefore, while the Court erred in charging the jury that defendant's agents could have waived the stipulation of the contract, and in leaving it to the jury to say whether

they had done so, the error was favorable to defendant, because it afforded defendant an opportunity of escape from liability on the finding against the alleged waiver, when the plaintiff was entitled to have the jury instructed that the ticket was good, and that it should have been honored. Therefore, the error was not prejudicial.

The only other question made by the exceptions is, whether the Court erred in refusing to charge defendant's second request, to wit: "If the jury shall find that defendant's agent on train threatened to eject plaintiff, by

3 mistake, under a supposed right, then they cannot give punitive damages; unless act was done with actual wrong intention and with such recklessness as to show malice or a conscious disregard of plaintiff's right, they cannot find any punitive damages."

The request was not in accord with the principle laid down in *Tollison v. R. Co.*, 88 S. C. 7, 70 S. E. 311, where it was held that, even though a tort-feasor might not be conscious of his invasion of the rights of another, yet if the tort was committed in such a manner or under such circumstances that the jury find that a person of ordinary reason and prudence would have been conscious of it as such, it warranted the infliction of punitive damages.

Affirmed.

MR. JUSTICE GAGE was not on the bench when this case was decided.

NOTE: This case has been carried to the United States Supreme Court on writ of error.

REF.]

April Term, 1914.

8747

EX PARTE HOLMAN.

IN RE COLEY v. COLEY.

(81 S. E. 518.)

JUDICIAL SALES. PROCEEDS OF SALE. ASSIGNMENT.

1. Petitioner acquired subsequent to a judgment and decree for sale, and prior to sale, an assignment of his assignor's undivided one-third interest in net proceeds of sale of lands (after payment of amount due on a mortgage thereon) ordered to be sold at judicial sale. The assignor then bid in the property at such sale, and failed to comply with her bid. Thereupon the property was ordered under a supplementary order to be resold at said assignor's risk as bidder. *Held*, petitioner's assignor, though entitled to one-third the net balance of the resale of property after the mortgage shall have been paid, could not, before such resale, demand that any certain part of the proceeds be paid to her.
2. So, petitioner's assignor not being entitled to demand such payment, neither could petitioner, the assignee.

Before BOWMAN, J., Charleston, September, 1913. Modified.

Action by Eliza Coley against J. M. Coley. Heard upon the *ex parte* petition of W. A. Holman. From an order directing payment to petitioner of a certain amount out of the proceeds of a resale of property, defendant appeals.

From the case it appears that on the 29th day of April, 1912, Eliza Coley, in consideration of \$200.00 in cash received from W. A. Holman, and for a fee of \$800.00 agreed upon, between the parties, made, executed and delivered to W. A. Holman, Esq., an assignment of her one-third interest in a judgment which she had recovered in the case of *Coley v. Coley*, 94 S. C. 383, 77 S. E. 49; on the 25th of June, 1912, after the assignment to said W. A. Holman, the property was sold under said judgment at public outcry by F. K. Myers, one of the masters for Charleston county, and was purchased by Eliza Coley at

and for the sum of \$12,300.00, but Mrs. Coley was unable to comply with her bid, and it was necessary to have an order of the Court to resell the property; Mrs. Coley resisted the resale at her risk, but the Judge decreed otherwise in the cause, and directed the property to be resold by F. K. Myers, one of the masters for Charleston county. On September 24th, 1913, Mr. Holman filed a petition in the Court, setting forth the fact that Mrs. Coley had assigned to him one-third of the judgment in the case of *Eliza Coley v. J. M. Coley*, to secure him for \$200.00 cash advanced, and for \$800.00 for services rendered, and J. M. Coley was duly notified of this assignment before the first sale. Mr. Holman took the position that he had a lien on the one-third of the judgment for the sale of said property, and that Mrs. Coley by no act on her part could destroy his security under said assignment, as it also appeared that he had no part in the bid made by her; J. M. Coley took the position that the rights of W. A. Holman, Esq., should be subject to the resale, and that if the property did not bring a sufficient amount to make good any deficiency that might arise, on account of the bid of Mrs. Coley at the first sale, that then the rights of the said W. A. Holman should be so far destroyed or diminished. Judge Bowman did not agree with the contention of J. M. Coley, and decreed that Mr. Holman be paid \$1,000.00 out of the one-third represented by the interest of Mrs. Coley, if the same should be sufficient to pay said amount, after deducting all proper charges, and if less than \$1,000.00, then such amount be paid to him on account of such assignment, as remained in the hands of the master for that purpose. The defendant, J. M. Coley, appealed from the order of his Honor, Judge I. W. Bowman, upon the grounds and exceptions set out in the case.

Messrs. Logan & Grace, for appellant.

REF.]

April Term, 1914.

Mr. R. C. Holman, for respondent.

March 16, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

This proceeding is a sequel to *Coley v. Coley*, reported in 94 S. C. 383, 77 S. E. 49; wherein some issues were decided by Judge Sease and some issues were decided by Judge Memminger.

The sale of defendant's property therein referred to as having been ordered, was made; and the plaintiff and his wife, Eliza, bid off the property so sold at \$12,300.00.

Thereout was to be deducted a mortgage debt thereon and certain costs and fees. Then out of the net balance Eliza was to have the one-third, theretofore adjudged by the Court to be due to her.

Had the purchaser at that sale complied with the bid and paid into the Court \$12,300.00, this issue would not have been made.

But at the sale Eliza was the bidder, and she did not comply, and the Court ordered a resale thereof at her risk; and the sale has not yet been had.

It is plain, therefore, that Eliza cannot *now*, before the resale, demand any certain part of the proceeds which may be paid in, after a resale yet to be had, shall be paid to her, say, \$1,000.00.

And for the manifest reason, that the portion of the fund to which Eliza may be entitled may be reduced by charging against it any loss which may come out of the resale; because she has been adjudged liable for such loss.

If, therefore, Eliza cannot now demand such payment, neither can she assign to another the right to demand it.

But that is the petitioner's case, he holds only an assignment from Eliza; and like her he must wait and see what shall be in the pot for Eliza at the wind up, before he can take out anything.

In our opinion the order must be modified, so that it shall provide for the payment to the petitioner of \$1,000.00, if so much there be out of the amount which shall come to Mrs. Coley, after the resale has been had pursuant to the decree of the Circuit Court, which directed a resale.

The payment of costs and fees had theretofore been fixed by the decree of Judge Sease; and reference thereto must be had.

The costs in those issues determined by Judge Memminger must have been apportioned by his decree; if so, that is the law of the case; if not so fixed, they are taxable by the clerk pursuant to law.

Let the order below be so modified, and let the parties await the events of the future.

8821DRIGGS *ET AL.* *v.* SOUTHERN RY. CO.DRIGGS *v.* SAME.

(81 S. E. 431.)

CARRIERS. TRANSPORTATION OF PASSENGERS. SALE OF MILEAGE. MISREPRESENTATIONS. CARRIER'S LIABILITY.

Where a carrier's ticket agent sold certain mileage books to plaintiffs, and assured them that they might use the same to pursue a certain route to destination, which assurance was untrue, and the carrier thereafter refused the mileage coupons in payment for tickets for a portion of the route, it was liable to the purchasers for the damages sustained, though by a careful examination of the book and tariffs they might have ascertained that the representation was untrue.

Before CHARLES CARROLL SIMMS, special Judge, Bamberg, November, 1913. Affirmed.

Actions by Fannie G. Driggs and another and by Hubert Driggs, by his guardian *ad litem*, against the Southern Rail-

REP.]

April Term, 1914.

way Company—Carolina Division. Judgment for plaintiffs, and defendant appeals.

Messrs. B. L. Abney and Harley & Best, for appellant, cite: *Lawful tariffs govern irrespective of contract*: 202 U. S. 242; 158 U. S. 98; 204 U. S. 426; 119 Ala. 537; 107 N. W. 56; 28 S. E. 601; 39 L. R. A. 275; 40 S. W. 899; 85 N. W. 1001; 43 S. W. 609; 21 S. W. 290; 37 So. 134; 45 So. 983; 94 Pac. 951; 95 Pac. 71; 46 So. 1014; 63 S. E. 528; 115 N. Y. Supp. 838; 127 N. W. 543; 94 N. E. 900; 114 Pac. 469; 133 S. W. 1129; 116 Pac. 93; 63 So. 882; 5 I. C. C. Reports 241; 99 Va. 394. *Carrier not estopped to deny invalid contract*: 127 N. W. 543; 94 N. E. 906. *No action lies in tort for the misrepresentation or negligence of agent in making a misquotation of a tariff*: 202 U. S. 242; 83 S. W. 800; 113 Pac. 433; 94 N. E. 906; Merwin Equity, sec. 505; Cooley on Torts 247; 91 U. S. 45; 33 Ill. 243. *Mistake of law*: 12 Pet. 32; 1 Pet. 1; 8 Wheat. 174; 25 Vt. 603; 3 N. Y. 19; 21 Pac. 534; 41 Ala. 50; 37 Ala. 77; 35 S. W. 643; 223 U. S. 599; *Ib.* 155; 33 Supp. Ct. 397; 226 U. S. 441; 212 U. S. 504.

Messrs. Mayfield & Free and R. C. Hardwick, for respondent, cite: 88 S. C. 424; 69 S. C. 327; 88 S. C. 7; 87 S. C. 184.

April 23, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

Two cases for tort arising out of the same transaction and tried together, and a verdict in both for the plaintiff.

The plaintiffs bought two mileage books, form Z, at Denmark, one of the Southern and one of the Seaboard, intending to travel thereon from Denmark to Augusta over the Southern Railway; thence to Atlanta over the Georgia Railroad; thence to Chattanooga over the Southern Rail-

way. From Chattanooga, they purposed to go by a short line to Durham on Lookout Mountain. They claim that at Denmark they asked the ticket vendor to tear mileage from that point to Chattanooga over the aforementioned lines, and to issue therefor a ticket. They claim the agent declined to do that, but tore the book to Augusta only, and issued a ticket thereto, and that he then told the plaintiffs that the agent at Augusta would tear the mileage and issue tickets therefor over the aforementioned lines to Atlanta and so on. The plaintiffs claim they bought the books upon that assurance by the ticket seller at Denmark, and that assurance only. At Augusta, all hands admit, the ticket seller declined to tear mileage out the book, and issue a ticket therefor from that point over the Georgia road to Atlanta, and upon the ground that, by the terms of the book and of the interstate passenger tariff No. 5167, the holder of a mileage book, form Z, was not entitled to passage thereon from Augusta to Atlanta. The plaintiffs, on the second day after their arrival in Augusta, had mileage torn from their books, and took tickets in exchange from Augusta over the Charleston & Western Carolina to Spartanburg; thence over the Southern to Atlanta; thence over the Southern to Chattanooga. This route was some 140 miles further than that which the plaintiffs had planned to travel, and altogether different.

The gravamen of the plaintiffs' case is that the ticket seller at Denmark sold them books upon the representation that they might pursue a particular route, which turned out to be untrue, and to their hurt.

There is no testimony to show that the railroad agent at Augusta violated his duty to plaintiffs.

There are five exceptions, of which one charges the admission of incompetent testimony, two charge the wrongful refusal to direct a verdict for defendant, and three impute errors in the charge. But all the exceptions hinge on one matter, and it is this: The defendant insists (1) that the

REF.]

April Term, 1914.

ticket seller at Denmark did not make any false representation to the plaintiffs, and (2) if the ticket seller did make such false representation to the plaintiffs, yet the tickets and the passenger tariffs relevant thereto fixed the right of the plaintiffs, and was the evidence in the plaintiffs' hands that they were not entitled to the privilege they demanded, to wit: An exchange ticket at Augusta from Augusta to Atlanta over the Georgia Railroad.

The first matter makes an issue of fact, and was for the jury; the second matter makes an issue of law, and was for the Court.

Nothing else appearing, it is true that a passenger cannot demand a privilege from the carrier contrary to the contract plainly expressed in the ticket or stipulated in the tariffs; and the authorities cited by appellants go only to that extent. But that is not the issue here; the issue here is whether or not the ticket seller may with impunity sell the passenger a mileage book, like the one here, and make to the passenger statements about the route allowed by the book contrary to the route expressed in the book, it may be.

If the expression in the book and tariffs of the route allowable by the book was reasonably plain, there might be some reason for the defendant's contention, though the contention would not then be tenable. But that is not so, and the matter is not even made plain by the defendant's witnesses. The book does provide, "not good locally between stations on Georgia R. R." The Georgia Railroad, running part from Augusta to Atlanta, is a connecting line of the Southern Railway and en route from Charleston via Denmark to Atlanta. *Tes. Beach*, p. 50, fol. 197. Nobody would presume a run from Augusta to Atlanta would be a "local" run, and prohibited by the words of the book. If the passenger had looked to the book, therefore, for guidance, he would not have found it, but would have been misled. But, had the book been less free from ambiguity, yet when the ticket agent sold them to the plaintiffs, and assured

the plaintiffs that they might pursue a certain route thereon, which turned out to be untrue, to the plaintiff's hurt, then the master of the ticket agent is liable in tort to the bookholder who suffers thereby.

The argument in the recent case of *Smith v. Railroad*, 88 S. C. 425, 70 S. E. 1057, 34 L. R. A. (N. S.) 708, is full to that point.

The exceptions are overruled, and the judgment is affirmed.

MR. CHIEF JUSTICE GARY, and MESSRS. ASSOCIATE JUSTICES WATTS and FRASER concur.

MR. ASSOCIATE JUSTICE HYDRICK, *dissenting*. The case of *Smith v. Railroad Co.*, 88 S. C. 425, 70 S. E. 1057, 34 L. R. A. (N. S.) 708, was relied upon in the Circuit Court and in this Court to sustain plaintiff's case. But it seems to have been overlooked that no question of interstate commerce was raised or decided in that case. If it had been alleged and proved in that case, as it was in this, that the mileage ticket in question was sold in accordance with the tariff filed with the interstate commerce commission, and published, as required by the act to regulate commerce, a very different phase would have been presented.

As I understand, it was conceded in the Court below that the ticket was not good over the Georgia Railroad—that is, from Augusta to Atlanta. The Circuit Judge so held and so charged the jury, and, therefore, it is the law of the case. But plaintiff's recovery is sustained on the ground of the misrepresentation of the defendant's agent at Denmark, who sold the ticket, and told plaintiff that it was good over that road, and could be used by her for passage from Augusta to Atlanta. Assuming that the misrepresentation was made, it was as to a matter of law, to wit, the tariff on file with the commission, and the rights of plaintiff thereunder, which the plaintiff was conclusively

REP.]

April Term, 1914.

presumed to know. Therefore, no misrepresentation as to such matter, even if made wilfully, would give rise to a cause of action. The Supreme Court of the United States, whose decisions upon the question are controlling, has expressly so held in numerous cases, some of which are cited in the opinion of this Court in *Aldrich v. Railroad Co.*, 95 S. C. 427, 79 S. E. 316.

I think, therefore, the judgment should be reversed, and the complaint dismissed.

NOTE: This case has been carried on writ of error to the United States Supreme Court.

8860

STATE v. GRIFFIN ET AL.

(82 S. E. 254.)

CRIMINAL LAW. CONTINUANCE. WITNESSES. CHARGE TO JURY. CORONER'S INQUEST. EVIDENCE.

1. Where, on June 26th, the coroner's jury found that a person's death was caused by defendants, who were then held on the coroner's warrant as material witnesses, after a secret session to which defendants' attorney was denied admission, they were indicted for murder on July 7th, and the following day furnished the evidence and inquisition taken by the coroner, which was not filed, a motion for a continuance on July 9th, on which day the case was set for trial, was addressed to the discretion of the trial Court, and the circumstances did not show that such discretion was erroneously exercised by denying the motion.
2. On a trial for murder, one jointly indicted with defendants, but not on trial, was a competent witness.
3. On a criminal trial, the modification of an instruction that, where the State relied upon circumstances to establish defendant's guilt, it must prove each individual circumstance so relied on to the satisfaction of the jury to a moral certainty or beyond a reasonable doubt, or that the jury must disregard any such circumstance from further consideration, by adding that the force of all circumstances was with the jury, was not erroneous; the modification not being confusing or misleading, but emphasizing the proposition that the force and effect of the testimony was to be determined by the jury.

4. A coroner's inquest is within the spirit of Const., art. I, sec. 15, requiring all Courts to be public.
5. A coroner's inquest is merely a preliminary investigation and not a trial involving the merits, and a suspected person has no right to appear by counsel and cross-examine the witnesses, as the only object of such a course would be to prevent a full investigation, in so far as it might tend to incriminate him, thus defeating the purpose of the inquest.

Before C. J. RAMAGE, special Judge, Chester, July, 1913
Affirmed.

Meeks Griffin, Thomas Griffin, John Crosby, and Nelson Brice, being convicted of murder, appeal. The following statement of facts appears in the record:

"On April 24th, 1913, Mr. John Q. Lewis, an elderly Confederate soldier, was shot and killed in his home in the nighttime, about ten miles in the country from Chester, S. C. There was no eyewitness to the tragedy, so far as known; great indignation was manifested by the citizens of the county; detectives were put to work on the case; and the officers did all in their power to bring the assassin or assassins to justice. Shortly after the homicide, a man and his wife, other than these appellants, were arrested, charged with the crime; the sheriff took them to the State penitentiary for safe-keeping because of threats of lynching; the coroner immediately impaneled a jury; and after a brief session they adjourned, and never met any more until 26th June ult., when they met and found the following verdict, after a secret session, to which appellants' attorney was denied admission: 'That the said John Q. Lewis, deceased, came to his death from gunshot wounds in the hands of Meeks Griffin, Thos. Griffin, John Crosby, and Nelson Brice, and John Stevenson, accessory before the fact.' That the defendants-appellants had been arrested and confined in the Chester county jail since June 13th ult.,

FOOTNOTE.—See *State v. Bowman*, 43 S. C. 108, 20 S. E. 1010, holding that preliminary investigation is not essential to validity of indictment.—REPORTER.

REP.]

April Term, 1914.

on a warrant issued by the coroner, alleging that each of them were material and important witnesses concerning the death of John Q. Lewis, deceased.

"On the 7th day of July, thereafter, a true bill was returned by the grand jury of Chester county, charging the said Meeks Griffin, Thomas Griffin, John Crosby, Nelson Brice, and John Stevenson, *alias* Monk Stevenson, jointly with the murder of the said John Q. Lewis, deceased, as per certified copy of the indictment filed with the case, and on that same day all five of the said defendants were duly arraigned on said indictment, each of said defendants entered their plea thereon of not guilty, and not ready for trial (John Stevenson, *alias* Monk Stevenson, was not put on trial). The Court, however, set Wednesday, the 9th day of July, as the day for trial. The evidence and inquisition as taken by the coroner was not filed, but on Tuesday, July the 8th ult., was handed to defendants' attorney in Court, by the solicitor, and on that day defendants' attorney made a motion for continuance of the case for these four defendants-appellants, on the following affidavit: [Then follows affidavit of appellants' attorney.] Same was refused by the Court on the following order:

" 'In the above matter I refuse a continuance. It does not occur to me that a continuance ought to be granted in the within case. The matter has been presented very ably and earnestly by Mr. Newbold.

" 'C. J. Ramage, Special Judge, Presiding.

" 'July 8, 1913.'

"On Wednesday, July 9th, case was called, and the four defendants-appellants herein were placed on trial before a jury. The case of the other defendant, Stevenson, was held up for the present by the solicitor. No other disposition being made of his case, Monk Stevenson was sworn by the State as a witness, and testified against these defendants-appellants, over objection, that he was an incompetent witness because he was a codefendant with them.

"The Court amended defendants' second request to charge by adding the words, to the end thereof, 'and the force of all circumstances are with the jury.'

"The jury returned the following verdict: 'Guilty as to Meeks Griffin, Thomas Griffin, John Crosby, and Nelson Brice.'

"A motion for a new trial was duly made by defendants, on the grounds 'that an incompetent witness, to wit, John Stevenson, *alias* Monk Stevenson, a codefendant, had been permitted to testify against them, over objection, and that there was no evidence to sustain the verdict.' Motion overruled.

"The Court then sentenced these defendants-appellants to death by electrocution on September the 26, 1913."

The following are the exceptions of the appellants:

(1) That the Court erred, it is respectfully submitted, in overruling defendants' motion for a continuance of the case. (a) Because the coroner had not filed the evidence taken at a secret session of his jury, to which appellants' attorney had been denied admission, before the true bill was found by the grand jury, and the defendants had no time to prepare their defense, after being apprised of the nature of the crime of which they were charged, and were thus denied a fair and impartial trial as contemplated by law. (b) Because the showing made justified the conclusion that a fair and impartial trial could not be given the accused at that time on account of the inflamed state of the public mind and the sentiment against any one accused of the crime.

(2) That the Court erred, it is respectfully submitted, in permitting John Stevenson, *alias* Monk Stevenson, to be sworn as a witness, and to testify against the defendants on the trial of the case, over objections, because he was a codefendant with the accused, and as such was an incompetent witness against them, and his testimony was irrelevant and incompetent.

(3) That the Court erred, it is respectfully submitted, in not charging defendants' second request to charge, and in amending same by adding, "The force of all circumstances are with the jury." (a) Because said request was a sound proposition of law applicable to the case; and (b) because the amendment was confusing to the jury, and left the impression that they could consider any circumstances that the State injected into the case, without regard to whether it was proven beyond a reasonable doubt, or not, and thus destroyed the effect of the request on the jury.

REF.]

April Term, 1914.

(4) That the Court erred, it is respectfully submitted, in overruling defendants' motion for a new trial on the grounds that an incompetent witness, to wit, John Stevenson, *alias* Monk Stevenson, a codefendant, was sworn and testified, over objection, against the defendants, and that there was no evidence to sustain the verdict, because Stevenson, a codefendant, had testified in the case, over objection, he was an incompetent witness and his testimony incompetent and irrelevant, and there was no competent evidence to sustain the verdict.

(5) That the defendants-appellants will move the honorable Supreme Court to dismiss the case or order a new trial, because there was no evidence given against them, or either of them, to justify a conviction on said charge.

Mr. W. H. Newbold, for appellants, submits:

In cases involving life and liberty errors of the trial Court not properly raised by exceptions may be considered *in favorem vitae*: 40 S. C. 345; 6 S. C. 462; 12 S. C. 96. Incompetent testimony as to alleged confession was erroneously admitted: 36 S. C. 532. Failure to file coroner's inquisition and evidence: Cons. 1895, sec. 30, art. 5; Civil Code 1283, 1287, 1288, 1308; Crim. Code, sec. 66. What is filing: 14 S. C. 43; 64 S. C. 338. Failure to file delayed defendants' access to testimony, and preparation to meet same. Defendants should be allowed time to meet accusation: 79 S. C. 548; 12 Cyc. 503; 1 Brev. 8; 1 Bay 1; 109 Ill. 635; 4 Enc. Pl. & Pr. 833; 6 Enc. 992. Lack of time for preparation good ground for continuance: 14 Cent. Dig., sec. 1305; 7 Iowa 347; 76 Ga. 288. Such time should be allowed after indictment found (68 Mo. 444), for no charge is pending before bill found: 2 S. C. 356; 12 S. C. 95. Abuse of discretion in refusing continuance: 77 S. C. 240; 48 S. C. 1; 33 S. C. 109. Public excitement ground for continuance: Thatcher Cr. Cases (Mass.) 516; 32 Ga. 581; 79 Am. Dec. 307. New trial should be granted where lack of time for preparation affected defense: 10 Rich. 257, or when proof insufficient to sustain verdict: 11 S. C. 275; 1 Mills 29; 4 Rich. 260; 1 S. C. L. Coroner's proceedings should be public: Const. 1895, art. 5, sec. 12. Right to preliminary examination when accused of crime: Crim. Code 33; Const. 1895, art. 1, sec. 18. Due process: Const. 1895, art. 1, sec. 5. Competency of codefendant as witness: 85 S. C. 150. Degree of proof: 1 Starkie Ev. 571; 4 Elliott Ev., sec. 2713; 3 Chamberlayne Ev., sec. 1764; 66 S. C. 397; 49 S. C. 285; 35 Am. Dec. 561; 52 Am. Dec. 711; 33 Tex. Cr. App. 264; 26 S. W. 209. Modification of proper request error: 83 N. J. 643.

Mr. Solicitor Henry, for the State, respondent.

May 28, 1914.

The opinion of the Court, after reciting the foregoing statement of facts, was delivered by MR. CHIEF JUSTICE GARY.

The first question raised by the exceptions is whether his Honor, the presiding Judge, erred in overruling
1 the motion for a continuance. The motion was addressed to his discretion, and it has not been made to appear that it was erroneously exercised.

It is only necessary to refer to the case of *State v. Kennedy*, 85 S. C. 146, 67 S. E. 152, to show that
2 the second and fourth exceptions cannot be sustained.

3 The defendants' attorney presented the following request:

"That where the State relies upon circumstances to establish the guilt of the defendant, it must prove each individual circumstance, so relied on, to the satisfaction of the jury, to a moral certainty, or beyond a reasonable doubt, or the jury must disregard any such circumstance from further consideration in the case."

The Circuit Judge amended the request by adding the words "the force of all circumstances are with the jury," and then charged it. We are unable to discover any reasonable ground for supposing that the additional words might have confused or misled the jury. They were merely used for the purpose of emphasizing the proposition (about which there can be no doubt) that the force and effect of the testimony was to be determined by the jury.

It is only necessary to refer to the testimony to show that the fifth exception cannot be sustained.

Upon the hearing of the appeal, this Court was requested to rule on the question whether a coroner is authorized by law to refuse the public the right or privilege
4 of attending an inquest and to hold it in secret, if he should be so advised.

REF.]

April Term, 1914.

Section 15, article I, of the Constitution, provides that "all Courts shall be public;" and a coroner's inquest comes within the spirit of that provision.

The Court was also requested to rule upon the question whether a person, in anticipation of the action of the coroner's jury, has the right to appear by counsel and to

5 cross-examine the witnesses in behalf of his client.

The proceedings are intended to be merely a preliminary investigation and not a trial involving the merits.

The only object which a suspected person could have in appearing by counsel would be to prevent a full investigation in so far as it might tend to incriminate him, and thus defeat the purpose of the inquest.

It is the judgment of this Court that the judgment of the Circuit Court be affirmed, and that the case be remanded to that Court, for the purpose of having another day assigned, for carrying into execution the sentence of the Court.

MESSRS. ASSOCIATE JUSTICES WATTS and FRASER concur in the opinion of the Court.

MR. ASSOCIATE JUSTICE HYDRICK dissents.

MR. ASSOCIATE JUSTICE GAGE did not sit in this case.

8863SEACOAST TIMBER CO. *ET AL.* v. THOMAS.

(82 S. E. 274.)

RECOVERY OF REAL PROPERTY. EVIDENCE. ISSUE FOR JURY.

1. Evidence showing a chain of title in plaintiffs, coupled with testimony showing that their predecessors in title paid taxes on the land and had possession for more than 40 years and until within 10 years before the commencement of the action, makes out a *prima facie* case of ownership by plaintiffs, raising a presumption that their predecessors in title took under a grant from the State.

2. In an action to recover land, where neither party deraigned title from the State, but both introduced evidence tending to raise the presumption of a grant, the question of title is for the jury.

Before WILSON, J., Monck's Corner, March, 1913. Affirmed.

This was an action brought originally by Theodore G. Barker *et al.* against Harvey C. Thomas *et al.*, for the recovery of possession of a tract of land in Berkeley county, which suit was commenced in July, 1906. The case was tried before Judge Memminger and a jury. The jury found for the defendant and Judge Memminger of his own motion set aside the verdict on the ground that it was inconsistent with the testimony. See *Barker v. Thomas*, 85 S. C. 82, 67 S. E. 1.

Since then the Seacoast Timber Co. and Joseph F. Heyward were substituted as plaintiffs, and the case dismissed as to Mrs. Haynes. The case was then tried before his Honor, Judge John S. Wilson, and a jury, in March, 1913. At the close of plaintiff's testimony the defendant made a motion for a nonsuit and direction of verdict on the grounds that plaintiffs had failed to connect with a grant or to show any title in themselves. This motion was refused and the case went to the jury, who rendered a verdict in favor of the plaintiffs. The defendant thereupon made a motion for a new trial on the same grounds practically as the motion for a nonsuit, and on the additional ground that the testimony showed title in defendant, and that the jury should have found for the defendant. This motion was refused by his Honor in a short order, and from the order refusing a nonsuit and the order refusing a new trial, the defendant, Harvey C. Thomas, appeals to this Court.

Mr. W. A. Holman, for appellant, cites: 37 S. C. 102.

Messrs. Ficken & Erckmann, for respondent, cite: *Payment of taxes evidence to go to jury*: 82 S. C. 358; 45

REP.]

April Term, 1914.

S. C. 312. *Evidence as to possession of plaintiff's predecessors in title for jury*: 3 Starkie Ev. 1229, 1226; 3 Term Rep. 158. *Kind of possession necessary to hold uncultivated pine lands*: 82 S. C. 358. *The evidence being sufficient to presume a grant, and title in plaintiff's predecessors, possession will be presumed within time required by law*: Code Civil Proc., sec. 126.

July 3, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

This was an action to recover a tract of timber land. The defendant denied plaintiffs' title, asserted title in himself, and pleaded the statute of limitation.

The plaintiffs proved a complete chain of title in themselves, which had its origin in the will of Thomas Broughton, dated in 1808. Their testimony tended to show that their predecessors in title had paid taxes on the land,

1 and had possession more than 40 years before the trial, and that their possession continued to within 10 years before the commencement of the action, which was in 1906. They proved such acts of ownership as are usually exercised over woodland. The testimony was indefinite and somewhat conflicting as to the dates and duration of these acts, but it was sufficient to make out a *prima facie* case and raise the presumption of a grant from the State. *Bardin v. Ins. Co.*, 82 S. C. 358, 64 S. E. 165; *Smyly v. Colleton Co.*, 95 S. C. 347, 78 S. E. 1026.

The testimony did not show title in defendant, as a matter of law. He seems to have overlooked the fact that his possession did not commence until 1903, the date of the conveyance to him, and that, even if it showed such

2 possession in him and his grantors as would warrant the presumption of a grant from the State, still the issue should have been submitted to the jury, whose province it was to determine the character and duration of

the possession which was relied upon by both parties. *Smyly v. Colleton Co.*, *supra*.

There was, therefore, no error in submitting the case to the jury or in refusing to set aside the verdict.

Affirmed.

MR. JUSTICE GAGE did not sit in this case.

8864

STATE v. KNOX.

(82 S. E. 278.)

CRIMINAL LAW. CRIMINAL PROCEDURE. WITNESSES. ASSAULT AND BATTERY. CHARGE.

1. Where a defendant testifies in his own behalf, his character for veracity is thereby opened, and he may be cross-examined about any of his past transactions affecting his credibility; but his testimony in his own behalf does not open his general moral character.
2. In a prosecution for assault and battery with intent to kill, where defendant testified in his own behalf, questions on cross-examination as to whether he had been in similar difficulties before, and had cut a certain named person, did not tend to impeach his credibility, as distinguished from his general moral character,, and hence were inadmissible.
3. Such testimony was inadmissible also because it tended to expose defendant to a criminal liability, or to some kind of punishment, or to a criminal charge.
4. Under an indictment charging assault and battery with intent to kill, a jury can find the defendant guilty of an assault and battery.
5. Evidence, in a prosecution for assault and battery with intent to kill, where defendant attempted to show that he acted in self-defense, *held* to require the submission of simple assault and battery.
6. It is not error to refuse to submit the question of assault and battery under an indictment for assault and battery with intent to kill, unless there is testimony to show that defendant is only guilty of assault and battery.

Before RICE, J., Anderson. Reversed.

FOOTNOTE.—As to right to question defendant concerning other crimes, on cross-examination, see note to *People v. Molineaux*, 62 L. R. A. 345.

REF.]

April Term, 1914.

Ab Knox was convicted of assault and battery of a high and aggravated nature, and he appeals.

Mr. A. H. Dagnall, for appellant, cites: *Cross-examination improper*: 79 S. C. 197. *Charge as to lower offense*: 2 Enc. Pleading & Practice 855, 856; 25 Ga. 396; 71 Am. Dec. 181; 14 Am. Crim. Rep. 364; 74 S. C. 459.

Mr. Solicitor Bonham, for the State, respondent.

July 3, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

The defendant was indicted for assault and battery with intent to kill, and was convicted of assault and battery of a high and aggravated nature.

The first question that will be considered is whether there was error, on the part of his Honor, the presiding Judge, in allowing the solicitor to cross-examine the defendant, over his objection, as to other quarrels, not connected in any way with the offense for which he was on trial, when he had not introduced testimony as to his reputation for peace and good order.

The record shows that the following took place during the cross-examination of the defendant by the solicitor:

"Q. Now, Knox, this isn't the first time you have been in trouble like this, is it? A. Trouble like what? Q. Why, like this, this fight? As a matter of fact, it is a common practice of yours to do things of this kind, isn't it? You cut Mr. Trammel over there at Belton, didn't you? Objected to by Mr. Dagnall: It is not permissible to cross-examine the defendant on quarrels with persons other than the prosecutor, as this does not tend to affect the credibility of the defendant. The defendant has not put in issue his reputation or character for peace and good order; therefore, the State cannot attempt to show that he has a turbu-

lent or violent character. The only issue in this case is this: Is the defendant guilty of an assault and battery, with intent to kill, upon one Frank Fant? And other quarrels would be irrelevant and prejudicial to the defendant, as we did not anticipate that we would have to answer for every difficulty in which the defendant might have been connected in the past. Mr. Bonham: Your Honor, if they put witnesses up as to his reputation, I could bring witnesses here to controvert them. But, where the man goes on the stand himself, he certainly lays the gate open to all of his previous actions, to discredit his statements in this particular case, and I am entitled to prove, if I can, by his own admissions on cross-examinations that he has a turbulent and violent character. Court: Go on, I will let you examine him."

His Honor, the presiding Judge, also allowed the solicitor to ask the defendant the following questions on cross-examination:

"Didn't you go up to the home of Mr. Coker on one occasion and raise a row? * * * Well, you went up there and got into a fight with him, didn't you? Now, didn't you on another occasion, at your home on Christmas Eve, didn't your own brother-in-law shoot at you for hitting your sister in the head with a pair of brass knucks?"

1, 3 There is a marked distinction between the credibility and the character of a witness.

"There is a wide difference between character and conduct for a time, and one equally wide between general character and proper credit on a special trial or occasion." *Chapman v. Cooley*, 12 Rich. 654; *State v. Jones*, 29 S. C. 201, 7 S. E. 296; *State v. Wallace*, 44 S. C. 357, 22 S. E. 411; *State v. Rice*, 49 S. C. 418, 27 S. E. 452, 61 Am. St. Rep. 516; *State v. Summer*, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707; *State v. Stukes*, 73 S. C. 386, 53 S. E. 643.

The general rule for attacking the credibility or character of a witness is fully stated in the case of *Sweet v. Gilmore*,

52 S. C. 530, 30 S. E. 395, cited with approval in *State v. Gibson*, 83 S. C. 34, 64 S. E. 607, 916.

In the case of *State v. Robertson*, 26 S. C. 121, 1 S. E. 445, the Court held that the generally accepted doctrine was that where the defendant testifies in his own behalf his character for truth and veracity is thereby uncovered, but not his general moral character. In that case the following language from Whart. Cr. Evid., secs. 429, 433, was quoted with approval:

"A party, it may be said generally, when he becomes a witness, is subject to the usual duties, liabilities, and limitations of witnesses. * * * His character for truth and veracity may be impeached and his testimony may be commented on by counsel to the same effect as the testimony of other witnesses."

A witness may decline to answer a question tending to subject him to a criminal prosecution. *State v. Mitchell*, 56 S. C. 524, 35 S. E. 210.

"The defendant, when sworn in his own behalf, may be asked on cross-examination about any of his past transactions tending to affect his credibility, but not about such as affect his character in other respects." *State v. Mills*, 79 S. C. 187, 60 S. E. 664.

The testimony to which the defendant interposed objections did not tend to impeach his credibility, and as he had not put his character in issue for peace and good order, the testimony was not admissible.

"In regard to the privilege of witnesses in not being compellable to answer, the cases are distinguishable into several classes: (1) Where the answer will have a tendency to expose the witness to a penal liability, or to any kind of punishment, or to a criminal charge. Here the authorities are exceedingly clear, that the party is not bound to answer." Gr. on Evid., sec. 451.

It will thus be seen that there are three reasons why the testimony was erroneously admitted: (1) Because it did

not tend to affect the credibility of the witness; (2) such testimony tended to subject the defendant to a penal liability or to some kind of punishment, or to a criminal charge; and (3) because the defendant had not put in issue his character for peace and good order. The exceptions raising this question are sustained.

The next assignment of error is as follows:

"Because his Honor erred in failing and refusing to charge the law of simple assault and battery, and in not allowing the jury to pass upon this issue. It is respectfully submitted that the law of simple assault and battery was applicable, as there was evidence introduced upon which the jury might well have rendered a verdict of guilty of assault and battery, and the Judge, instead of passing upon this question of fact, prohibited by article V, sec. 26, of the Constitution of 1895, should have allowed the jury to decide the degree of the offense, if any, of which the defendant was guilty."

The following statement appears in the record:

"Just before his argument to the jury, Mr. Dagnall asked the Court to charge the jury that any one of four verdicts could be rendered in this case; it depending upon the view that the jury might take of the testimony. First, the jury might find a verdict of guilty of assault and battery with intent to kill, or guilty of assault and battery of a high and aggravated nature, or guilty of assault and battery, or not guilty. The Court was especially requested to submit to the jury the issue of simple assault and battery. The Court declined to submit the issue of simple assault and battery, and charged the jury as follows: * * * Now, Mr. Foreman and gentlemen, if you find this man guilty of assault and battery with intent to kill, say guilty, and sign your name as foreman. If you find him guilty of assault and battery of a high and aggravated nature, say guilty of assault and battery of a high and aggravated nature, and

REF.]

April Term, 1914.

sign your name as foreman. If you find that he is not guilty, say not guilty, and sign your name as foreman."

The substance of the testimony is thus stated in 4, 5 the record:

"The evidence introduced by the State tended to show the following: That the defendant and prosecutor first had some words upon the trolley between Anderson and Belton, and that the defendant used opprobrious language towards the prosecutor; that when the car arrived at Belton there were other words, and defendant was arrested by the police, but was released upon a bond of \$10; that the defendant and the prosecutor met again at a livery stable; that, when the prosecutor discovered the presence of the defendant, he undertook to leave the building by the rear, and, upon finding that he could not, he started out of the front; that he was accosted by the defendant, who again used opprobrious language towards the prosecutor, who struck the defendant; that they grappled immediately with each other and fell to the ground, the prosecutor on top; that during the struggle the prosecutor was cut by the defendant; that the defendant did not have time to get the knife from his pocket, after he was struck by the prosecutor; that the defendant had been drinking. The evidence introduced by defendant tended to show that the defendant acted in self-defense throughout the difficulty, and that the prosecutor was the aggressor. No evidence was introduced by defendant as to his reputation for peace and good order."

The rule is well settled that an indictment for a higher offense will sustain a conviction for a lower offense included in the higher, and that a jury can find a defendant guilty of an assault and battery under an indictment charging assault and battery with intent to kill. 2 Enc. Pl. & Pr. 856, 857. There was testimony from which the jury might have drawn a reasonable inference, that the defendant was only guilty of assault and battery.

It is not error, however, for a presiding Judge to refuse to submit the question of assault and battery to the jury, under an indictment for assault and battery with
6 intent to kill, unless there is testimony tending to show that the defendant is only guilty of assault and battery: *State v. DuRant*, 87 S. C. 532, 70 S. E. 306. The exception raising this question is also sustained.

Judgment reversed, and the case remanded for a new trial.

MESSRS. JUSTICES HYDRICK, WATTS, and FRASER concur in the opinion rendered by the Chief Justice.

MR. JUSTICE GAGE, *dissenting in part*. I concur on the first issue, though I had thought the law to be otherwise than as stated by the Chief Justice. On the second issue I concur in the rule stated by the Chief Justice; but, applied to the testimony, the rule, in my judgment, sustains the Court below.

The verdict excluded the plea of self-defense, and made the defendant a wrongdoer. What was the measure of his guilt? The weapon used was a knife; and it was stated at the bar that the cutting was "rather serious." In my judgment there was no testimony from which the jury might have drawn a reasonable inference that the defendant was guilty only of simple assault and battery. On that issue of fact, I dissent.

REP.]

April Term, 1914.

8866

CRAWFORD v. RICE & HUTCHINS BALTIMORE CO.

(82 S. E. 278.)

MASTER AND SERVANT. CONTRACT OF EMPLOYMENT. APPEAL AND ERROR.
EVIDENCE. NEW TRIAL. ARGUMENT OF COUNSEL.

1. In a suit to recover a balance due on an employment contract, on which the only issue was whether under the contract plaintiff's compensation was to be based solely on commissions on his sales or whether defendant undertook that it should at least be a certain amount, evidence as to the salary plaintiff received after he quit defendant's service was properly excluded for remoteness.
2. The admission or exclusion of evidence on the ground of relevancy or irrelevancy is a matter within the sound discretion of the trial Court, whose judgment will not be reviewed unless unreasonably exercised or abused.
3. Alleged errors not presented to the trial Court in the motion for new trial will not be considered on appeal.
4. Where, in a suit to recover a balance due under an employment contract, the complaint alleged that plaintiff served defendant from March 1st until August 1st, and the answer alleged that the relations between the parties terminated on or about August 1st, defendant was not prejudiced by argument of plaintiff's counsel that the complaint alleged that defendant discontinued plaintiff's services in the latter part of July, 1912.
5. Argument of counsel on testimony that had been stricken was not error, where the argument was immediately terminated as soon as counsel's attention was called to the fact that the testimony had been stricken.
6. Misconduct of counsel in argument to the jury is not available for error, unless the Court is asked to rule thereon and to instruct the jury to disregard the same.

Before RICE, J., Laurens, April, 1913. Affirmed.

Action by J. W. Crawford against the Rice & Hutchins Baltimore Company to recover compensation due under contract for services as salesman. From judgment for plaintiff, defendants appeal. The facts are stated in the opinion.

Messrs. Richey & Richey, for appellant, cite: *Testimony as to value of services relevant on issue of credibility of*

witnesses: 16 S. C. 231; 66 S. C. 135; 87 S. C. 84. *Argument of counsel based on excluded testimony objectionable:* 75 S. C. 342; 97 S. C. 236.

Messrs. Simpson, Cooper & Babb, for respondent.

July 4, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

Plaintiff sued to recover the balance due him by defendant on a contract for services rendered as traveling salesman. Both parties alleged and relied upon a special contract. The only difference between them was as to the compensation agreed upon. Plaintiff testified that he was to get 5 per cent. on all sales, but, if his commission amounted to less than \$200 per month, he was nevertheless to get \$200 per month. Defendant's testimony was that plaintiff was to get only 5 per cent. on sales made.

The first exception complains of error in excluding evidence as to what salary plaintiff got after he quit the service of defendant. The ruling was correct. 1 Elliott on Ev., sec. 158. If the evidence had any relevancy, it was 1, 2 too remote to afford the basis of a logical inference as to whose contention was correct. Circumstances may have compelled the plaintiff to accept employment at less compensation. On the contrary, he may have gotten more. In either event, the fact would have been so remote as to have afforded only the basis of conjecture, and could have been of no material probative value in determining whose version of the contract was correct. The cases cited by appellant are not directly in point. In *Latimer v. Cotton Mills*, 66 S. C. 135, 44 S. E. 559, the plaintiff sued to recover his salary for the whole year, although he had served only one month. It was held that the defendant was entitled to credit for what he had earned or might, by reasonable diligence and effort, have earned during the

REP.]

April Term, 1914.

year after he was discharged by the defendant. Therefore the defendant was allowed to prove what he had received in other employment. But in this case the plaintiff sued only for the time that he actually served. In the other cases cited (*Tarrant v. Gittelson*, 16 S. C. 231, and *Edward v. Bank*, 87 S. C. 84, 68 S. E. 961) it was held that in actions on contract for services, where there is an issue as to the price or compensation agreed on, evidence as to the value of the services rendered is relevant, not as the ground of recovery, but merely as tending to establish the probability or improbability of the contentions of the parties. But in neither of those cases was evidence of contracts for similar services between the plaintiff and other persons admitted, though it may be conceded that, under some circumstances, such evidence might be slightly relevant. But, as a general rule, it is inadmissible. 1 Elliott on Ev., sec. 183. In all cases, the admission or exclusion of testimony on the ground of relevancy or irrelevancy must necessarily be left to the sound discretion and judgment of the trial Judge, which is subject to review only when it is unreasonably exercised or abused. *Oliver v. R. Co.*, 65 S. C. 26, 43 S. E. 307; 1 Elliott on Ev., secs. 147, 148. The second exception is based upon a misconception of the testimony. The plaintiff testified that he did not begin to work under the contract until the 1st of April, because he could not get his samples, through no fault of his, but that his salary began the 1st of March. There was, therefore, no error in sustaining the verdict which included his salary for the month of March. Moreover, the answer admitted that plaintiff entered upon his duties on the 1st of March.

The third exception assigns error in refusing to set aside the verdict, because the plaintiff testified that, under the contract, he was to canvass certain towns in South Carolina and some in North Carolina, and it appeared that

3 he had not canvassed those in North Carolina, having therein breached the contract. It is sufficient

to say that the record fails to show that the motion for a new trial was based upon this ground. Moreover, no such defense was set up in the answer, nor does it appear that either the Court or the jury was asked to consider it. Therefore it cannot be considered by this Court.

The fourth exception assigns error in refusing the motion for a new trial, because, in the course of his argument to the jury, plaintiff's attorney stated that the complaint alleged that defendant discontinued plaintiff's services in the latter part of July, 1912, and that defendant had an opportunity to deny the fact, when its testimony was taken *de bene esse*, and had not done so. Defendant's attorney interrupted and requested the Court to instruct the jury that the complaint contained no such allegation. The Court replied that the jury would have the complaint, and could read it for themselves, and see what it contained. In the first place, it does not appear that the motion for a new trial was based upon this ground. But, if it was, it was properly overruled. While the complaint did not allege that the plaintiff's services were discontinued, or that he was discharged, in the latter part of July, it did allege that he served the defendant from the 1st of March until the 1st of August. The answer also alleged that the relations between the parties terminated on or about the 1st of August. It is not perceived, therefore, how the defendant was prejudiced by the statement, or that there was any error in the ruling.

The fifth exception complains of error in refusing the motion for a new trial, because part of the argument of plaintiff's attorney to the jury was based upon testimony which had been stricken out. It does not appear that
5 this was a ground of the motion for a new trial. But, if it was, it was correctly overruled, because the record states that, as soon as attention was called to the fact that the testimony had been stricken out, the plaintiff's attorney ceased to argue along that line.

REP.]

April Term, 1914.

Besides, the Court was not asked to make any ruling or to give any instruction to the jury with regard to the matter. Moreover, it does not appear that defendant was or could have been prejudiced by this circumstance.

Affirmed.

8867

STURDYVIN v. ATLANTA & C. A. L. RY. CO.

(82 S. E. 275.)

MASTER AND SERVANT. INJURY TO SERVANT. NEGLIGENCE. CONTRIBUTORY NEGLIGENCE. EVIDENCE. ASSUMPTION OF RISK. NONSUIT. ISSUE FOR JURY.

1. On motion for nonsuit, the evidence and all inferences from it must be taken most strongly against defendant, and where there is some evidence of every fact essential to a recovery, the motion must be denied.
2. The negligence of a railroad company in failing to provide handrails and running boards at the sides of the tender of switch engines cannot be determined conclusively by what other railroad companies did or failed to do, but the fact that two railroad systems had so placed handrails and running boards has some bearing on the issue.
3. Whether a railroad company was negligent in failing to provide handrails and running boards at the sides of the tender of switch engines *held*. under the evidence, for the jury.
4. The duty of an employer to furnish appliances reasonably safe should not be determined solely with reference to the service required, but the measure of the duty depends also on how the service is customarily performed with the knowledge and acquiescence of the employer, and his duty does not end with the adoption of a proper system and promulgation of suitable rules, but he must exercise reasonable care to see that the rules are enforced, and that the instrumentalities furnished are properly used.
5. In an action against a railroad company for injuries to a brakeman while assisting in operating a switch engine, evidence *held* to support a finding of negligent failure to provide a safe place to work, in that the rails were about 18 inches above the roadbed when they should not have been more than 6 inches,³ and that such negligence was the proximate cause of the accident.
6. It is not contributory negligence as a matter of law for a brakeman, assisting in operating a switch engine, to get on or off a moving

engine, unless the situation is such as to make the danger of doing it apparent to a man of ordinary prudence.

7. Whether a brakeman, injured while assisting in operating a switch engine, was guilty of contributory negligence in attempting to mount the engine while in motion, *held*, under the evidence, for the jury.
8. Under the Constitution, the defense of assumption of risk is not available to a railroad company when sued by a brakeman in its employ for a personal injury.

Before SHIPP, J., Greenville, March, 1913. Affirmed.

Action by John M. Sturdyvin against the Atlanta & Charlotte Air Line Railway Company. From a judgment for complainant, defendant appeals.

Messrs. Cothran, Dean & Cothran, for appellant, cite: *As to alleged negligence in not providing a handrail and running board on the side of tender*: 1 Labatt, M. & S., secs. 35, 13; 78 S. C. 481; 30 Am. Rep. 661; 126 Mass. 84; 86 S. C. 271; 82 S. C. 224; 71 S. C. 58; 65 S. C. 194; 67 S. C. 136; 38 S. C. 199; 66 S. C. 302; 138 Fed. 6; 140 Fed. 568; 60 S. C. 153; 61 S. C. 488; 72 S. C. 421; 74 S. C. 143, 234; 76 S. C. 286. *As to alleged negligence in not warning plaintiff of the dangerous condition that existed in the track at the point where he attempted to mount the footboard*: 55 S. C. 488. *As to alleged negligence of engineer in starting the engine back before the plaintiff could give the signal to come back*: 78 S. C. 413; 34 S. C. 451. *Plaintiff's contributory negligence*: 90 S. C. 48; 86 S. C. 69; 84 S. C. 364; 82 S. C. 582; 85 S. C. 363; 89 S. C. 502. *Action at common law and not under Federal Employers' Liability Act*: 158 U. S. 285; 105 U. S. 221; 78 Atl. 34; Doherty, *Liability to Interstate Employees*, p. 67. *Respondent cannot sustain judgment upon ground of erroneous rulings by trial Judge*: 23 S. C. 105; 65 S. C. 207; 64 S. C. 571; 59 S. C. 498. *Assumption of risks*: 223 U. S. 50; 229 U. S. 119; 224 U. S. 611; 206 Fed. 868; 73 S. E. 679; 125 Pac. 336; 59 So. 264.

REP.]

April Term, 1914.

Messrs. Ansel & Harris, for respondent, cite: Safety Appliance Act of Congress, sec. 4; 222 U. S. 20; 226 U. S. 575; Judson Interstate Com. 588, 589; 80 S. E. 220; 112 N. C. 902; 210 U. S. 281, 294; 220 U. S. 559. *Contributory negligence*: 78 S. C. 356; 68 S. C. 84; Am. Ann. Cases A. 89; 94 S. C. 89; 66 S. C. 528; 79 S. C. 176; 90 S. C. 42; 82 S. C. 542; 94 S. C. 410; 66 S. C. 534; 93 S. C. 263; 40 S. E. 197; 75 S. C. 68; 196 U. S. 589; 229 U. S. 317-321. *Duty of master as to roadbed*: 69 S. C. 387; 74 S. C. 321. *Proximate cause question for jury*: 94 S. C. 324-335; 76 S. E. 553; 94 S. C. 410.

July 4, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

Plaintiff recovered judgment against defendant for \$5,000 damages for personal injuries sustained while assisting, as a brakeman, in operating a switch engine in defendant's yard at Greenville, S. C., by attempting to mount said engine when it was in motion. The engine was provided with two steps, sometimes called running boards, at the front, on each side of the drawhead, and two on the rear of the tender, similarly placed. The steps were about 12 inches wide and three feet long, with backstops about six inches high. They extended over the rails and hung about 12 inches above them. They were so placed for the employees to stand upon, as the engine went about its business over the yard, and so that they could conveniently get on and off to throw switches and attend to their other duties. To enable him to better perform his duties, and especially that of giving signals to the engineer, the brakeman was expected to ride on one of the steps at the forward end, that is, the end in the direction in which the engine was moving.

One of defendant's yard conductors, who had been for seven years, and was still at the time of the trial, in defend-

ant's service, testified that he had instructions from the superintendent not to allow any of the employees to attempt to get upon the steps of an approaching engine from the track, presumably because, in such an attempt, to fall or a misstep would throw them directly in front of the approaching engine, and that they were permitted to mount an approaching engine only from the side of the track. This instruction or rule was generally obeyed and enforced. Rule 11 of the company was as follows:

"Every employee must exercise the utmost caution to avoid injury to himself or to his fellows, especially in the switching of cars, and in all movements of trains, in which work each employee must look after and be responsible for his own safety. Jumping on or off trains or engines in motion, getting between cars in motion to couple or uncouple them, and all similar imprudences are dangerous and in violation of duty. All employees are warned that if they commit these imprudences it will be at their own peril and risk."

It will be seen that the rule does not, in so many words, prohibit the practice of jumping on or off moving engines or trains; and, though a prohibition of it may be implied from the warning therein given, the evidence is that, in that respect, the rule has never been observed or enforced. On the contrary, the custom of defendant's servants has been to get on and off moving engines and trains, and this custom has been so general and long continued as to warrant the inference that it obtained with the knowledge and acquiescence of defendant, notwithstanding the rule. The same conductor testified that, during seven years that he had been in the service, the custom had prevailed, and still prevails, and that it was known to and even practiced by the superior officers and agents of defendant. In fact, he said that he did not think it was a violation of the rules.

The night of the accident was dark and rainy. At the place where it occurred there was no light, except that

REF.]

April Term, 1914.

afforded by the switch light and the lantern which plaintiff carried, and the tracks were on an embankment, which began to slope very close to the end of the crossties, there being just enough room for a person to walk along the roadbed at the ends of the crossties, which were from 8 to 12 inches thick, and extended about that distance outside the rails. The roadbed was not surfaced, nor was there any ballast between the crossties outside the rails.

Plaintiff threw the switch to the track into which he had been ordered to take the engine. As he did so, the engineer, seeing that the switch had been properly set, did not wait for a signal, but immediately reversed his engine and started backwards into that track. Plaintiff was standing by the side of the track, and, as the engine approached him, at a speed from six to eight miles an hour, he attempted to jump upon the step at the end of the tender. His right foot struck the edge of the backstop an inch or two above the step, glanced off, and passed between the back of the step and the wheel. Before he could recover his balance his leg was caught by the wheel and crushed, so that it had to be amputated a few inches below the thigh.

The sole question presented by the appeal is whether the trial Judge erred in refusing defendant's motion for a nonsuit. It is unnecessary to cite authority for the proposition

that, on a motion for nonsuit, the testimony and all

1 inferences from it must be taken most strongly against the defendant. It is also well settled that, if there was any testimony tending to prove any one or more of the specifications of negligence, the motion was properly refused. It follows that it is necessary to consider only those allegations of negligence which are found to be supported by the evidence.

Negligence is charged in the failure of defendant to provide handrails or grab irons and steps, or running boards, at the sides of the tender. Plaintiff testified that it would be easier and safer to get on and off a moving engine if the

steps were on the sides, and he mentioned two railroad systems which had them so placed. While it is true that the allegation of defendant's negligence is not to be tested conclusively or exclusively by what other well regulated companies did or failed to do, still the testimony had some bearing upon the issue. *Lowrimore v. Mfg. Co.*, 60 S. C. 153, 38 S. E. 430; *Bodie v. R. Co.*, 61 S. C. 488, 39 S. E. 715; *Jennings v. Mfg. Co.*, 72 S. C. 421, 52 S. E. 113; *Fitzgerald v. Mfg. Co.*, 74 S. C. 234, 54 S. E. 373; *Keys v. Granite Co.*, 76 S. C. 286, 56 S. E. 949. This testimony considered in connection with and in the light of the other testimony in the case, and especially the fact that the employees were permitted to mount moving engines and cars, and were required, when they did so, to mount them from the side of the track, was sufficient to carry the issue to the jury.

The learned counsel for appellant admit that, if the testimony warranted the inference that defendant's employees were required to get on and off moving engines and cars, it was the duty of defendant to furnish appliances

4 reasonably safe and suitable for such service. But the duty of the master should not be determined solely with reference to the service required. The measure of the duty also depends somewhat upon the manner in which the service is customarily performed, with the knowledge and acquiescence of the master. The master's duty does not end with the adoption of a proper system and the making and promulgation of suitable rules for the safety of his servants. He is bound also to exercise reasonable care and diligence to see that the rules are enforced, and that the instrumentalities furnished are properly used. 3 Labatt, M. & S. (2d ed.) secs. 1110, 1120.

While the testimony may not warrant the inference that the employees were actually required to get upon moving engines and cars, it does warrant an inference of an invitation to do so, implied from the custom, and, perhaps, also,

REF.]

April Term, 1914.

that doing the work in the customary way was a condition of remaining in the service. Under such circumstances, the existence of the rule suggests the possibility of its having been made and promulgated for purposes other than the real desire to safeguard the defendant's employees. Under such circumstances, a rule should not be an effective shield from liability. *Bussey v. Ry.*, 78 S. C. 356, 58 S. E. 1015, Ann. Cas. 1912A, 89.

The next specification of negligence which finds support in the evidence is in not providing a safe place to work, in that the rails at the switch were about 18 inches above the roadbed, when they should not have been more than 5 6 inches, the height of the rails above it. This necessarily involves the allegation that the roadbed at that place should have been surfaced to the level of the top of the cross-ties. Appellant contends that the only inference from the facts and circumstances is that this defect was not the cause of the accident, because it indisputably appears that the sole cause of the accident was, not that the plaintiff did not jump high enough to catch the foot-board, but because his foot struck the backstop instead of the step. This argument is plausible, but it leaves out of view the fact that the necessity of having to make such a high step from the edge of the embankment may have been the cause of plaintiff's miscalculation, not only of the height of the step, but also of its position and of his ability to safely catch it. It is matter of common knowledge and experience that such a feat is more easily and safely accomplished from a level surface. Such an equation is composed of numerous factors of more or less importance; and it may be that one of the most important here involved was the failure of plaintiff's mind to properly and accurately direct his physical energies in the attempt, on account of the situation and circumstances mentioned. In *Strauss v. R. Co.*, 94 S. C. 324, 77 S. E. 1117, an iron bolt was allowed to remain on the ground in the defendant's yard, where

employees were constantly getting on and off moving engines and cars. The plaintiff stepped from a moving engine upon it, and it either rolled, or his foot slipped from it, and he was thrown under the engine and injured. It was held that, allowing this bolt to remain upon the yard, in connection with the unevenness or irregularities in the surface of the ground, was sufficient evidence of negligence to carry the case to the jury. This is a much stronger case than that. In view of the known and permitted custom of employees jumping on and off moving engines and cars, and the fact that it was frequently done in the night, and of the absence of light, except that afforded by the switch light and the plaintiff's lantern, it was properly left to the jury to say whether the place was reasonably safe or not.

The next question to be considered is whether the motion should have been granted, because the testimony is

6 susceptible of no other inference than that plaintiff was guilty of contributory negligence. That contention is stated by appellant as follows:

"As the switch engine was backing past the spot where the plaintiff had thrown the switch and where he was standing in a place of perfect safety, the plaintiff attempted to board the switch engine upon the rear footboard of the tender, which was then in front, as the engine was running backwards, in direct violation of the rules of the company, which forbids employees from jumping on engines in motion in the nighttime, incumbered with a lantern in one hand, at a point inadequately lighted for such an attempt, where the distance from the ground to the step was greater than at other points of the yard, and when he knew that a false step or other miscalculation would inevitably throw him directly in the path of the approaching engine, when there were other safe places accessible to him for boarding the same, and when care for his own protection required that he should wait until the engine stopped."

REP.]

April Term, 1914.

The effect of the alleged violation of the rule has already been discussed. It is not contributory negligence to get on or off a moving train unless the situation and circumstances are such as to make the danger of doing so apparent to a man of ordinary prudence, and ordinarily it is a question of fact for the jury. *Strauss v. R. Co.*, *supra*, and cases cited. The facts and circumstances of this case were susceptible of more than one inference, and that question was properly sent to the jury.

Under the Constitution of this State, the defense of assumption of risk was not available to defendant.

8 *Youngblood v. R. Co.*, 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824; *Bodie v. Ry.*, 61 S. C. 468, 39 S. E. 715.

These views make it unnecessary to consider the other grounds of nonsuit, or the ground upon which plaintiff asked that the judgment below be sustained, to wit, that the action was under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), and the alleged failure of defendant to comply with the Safety Appliance Act of Congress (Act March 2, 1895, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]).

Affirmed.

8868

STATE v. MCCOY.

(82 S. E. 280.)

CRIMINAL LAW. VENUE. JURISDICTION.

Under Const., art. I, sec. 17, providing that no person shall be held to answer for a crime except in the county where the crime shall have been committed, the right of a party to be tried in a county where the crime was committed is jurisdictional, and hence defendant could not be lawfully convicted in L. county for selling a mortgaged mule in C. county.

Before SEASE, J., Bishopville, Fall term, 1913. Reversed.

C. H. McCoy was convicted in Lee county for selling a mortgaged mule in Chesterfield county, and he appeals.

Mr. T. H. Tatum, for appellant, cites: *Offense must be committed in county to give jurisdiction*: 43 S. C. 202; 87 S. C. 535; 57 S. C. 263; 74 S. C. 450; Const., art. I, sec. 17; 7 Cyc. 65.

Messrs. P. H. Stoll and B. F. Kelley, for the State, respondent.

July 4, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

The following statement appears in the record:

"The defendant in this case was indicted by the grand jury of Lee county for the disposing of one mule over which J. M. & R. L. Hearn, a copartnership, doing business at Bishopville, Lee county, S. C., held a lien, to wit, a chattel mortgage; the amount due thereon being \$65. The case was tried before his Honor, Judge T. S. Sease, and a jury, during the Fall, 1913, term of the Court of General Sessions for Lee county, and resulted in a verdict of guilty and sentence thereon. The evidence of both the State and the defendant disclosed that the defendant resided in Chesterfield county, and while so residing purchased a mule from J. M. & R. L. Hearn, giving a chattel mortgage as part payment of the purchase price. That this mortgage was recorded in Chesterfield county, and nowhere else. That the defendant took the mule to Chesterfield county and disposed of it in that county, and that the debt was not paid, within ten days, nor the money deposited with the clerk of Court for Lee county to cover the debt. At the close of the

REF.]

April Term, 1914.

State's case, the defendant moved for the direction of a verdict, on the ground that the evidence shows that the property was disposed of in Chesterfield county and not in Lee county, which motion was overruled. At the close of all the testimony in the case, the defendant renewed his motion for a directed verdict upon the same ground, which motion was again overruled. The defendant asked the Court to charge that it must be proven that the property was disposed of within Lee county, in order to give the Court of General Sessions of Lee county jurisdiction, which request was denied. The appeal questions these rulings of the Circuit Judge."

Section 17, art. I, of the Constitution, provides that:

"No person shall be held to answer for any crime where the punishment exceeds a fine of one hundred dollars or imprisonment for thirty days * * * unless on a presentment or indictment of a grand jury of the county where the crime shall have been committed."

The case of *State v. Blakeney*, 33 S. C. 111, 11 S. E. 637, shows that the question whether the crime was committed in the county alleged in the indictment is jurisdictional in its nature, and therefore does not involve the merits of the case. And in the case of *State v. Browning*, 70 S. C. 466, 50 S. E. 185, it was held that such objection relates to the jurisdiction of the person, and is waived when the defendant contests the case upon the merits.

The foregoing statement of facts shows that there was error on the part of his Honor, the presiding Judge, in refusing to direct a verdict in favor of the defendant on the ground that the crime was not committed in Lee county. It would thus have appeared upon the record that the merits of the case were not involved and that the defendant was subject to indictment in Chesterfield county.

Judgment reversed.

8869

LUMMUS COTTON GIN CO. v. COUNTS.

(82 S. E. 391.)

PARTIES. CONTINUANCE. PLEADINGS. RULES OF COURT.

1. The order in which cases on the calendar shall be called for trial, the hours for sessions of the Court, and the granting or refusing of motions for continuance, either within or beyond the term, are in the discretion of the trial Court, and the exercise of that discretion will not be interfered with unless it is clearly made to appear that it was abused.
- 1a. Where a cause was properly docketed for trial, the defendant could not complain that it was reached and ordered to trial before those ahead of it on the calendar were tried or disposed of, where it did not appear that, by relying in good faith and for good and sufficient reasons upon the belief that the cases ahead of his would be tried, he was caught unawares and unprepared for trial, and though his attorney stated that defendant was out of the city, it did not appear that he was needed as a witness, or for any other purpose, and his attorney, though asked, did not say that he had a meritorious defense and did not offer any evidence.
2. Objection to the call of a cause on the calendar for trial is waived by consent that it be marked "heard," and referred to a special referee to take and report the testimony to the presiding Judge.
3. Where a case is, by consent, marked "heard" in open Court, and referred to a referee to take and report the testimony to the presiding Judge, a decree by such Judge based on such report is to be regarded as rendered in open Court.
- 3a. Where defendant, when his cause was called for trial on the last day of the term, agreed that it should be marked "heard" and referred to a referee to take and report the testimony, the date of the reference being fixed in the order by his consent and for his convenience, he could not complain that this was done, or that the referee failed to give four days' notice of the reference, and filed his report with the Judge after he had adjourned Court and left the Circuit, instead of with the clerk, or that the Judge signed and filed a decree and judgment after the adjournment of Court, based upon the testimony and proceedings before the referee.
4. An agreement that a cause be marked "heard," and referred to a referee to take and report the testimony for the purpose of such hearing, made orally, in open Court and noted by the Judge, is binding upon the parties.
- 4a. Under Circuit Court rule 14 providing that no agreement or consent between the parties or their attorneys respecting the proceedings in

REF.]

April Term, 1914.

a cause shall be binding unless reduced to the form of an order by consent and entered, or in writing subscribed by the party against whom it shall be alleged, or unless made in open Court and noted by the presiding Judge or stenographer on his minutes by the direction of the presiding Judge, it would be presumed that an agreement that a case should be marked "heard" and referred to a referee to take and report the testimony was noted by the presiding Judge where nothing appeared to the contrary, especially where it was mentioned in the decree.

5. Allegations as to plaintiff's corporate capacity are not placed in issue by allegation of lack of knowledge or information sufficient to form a belief as to their truth.
6. Allegations of complaint not denied in answer are admitted.

Before RICE, J., Laurens, April, 1913. Affirmed.

Action by Lummus Cotton Gin Company against D. H. Counts. From judgment for plaintiff, defendant appeals. The decree appealed from was as follows:

"This is an action for the foreclosure of a chattel mortgage and sale of the property therein described. It was commenced by the service of a summons and complaint on the defendant on the 22d of November, 1912. Within due time the defendant answered. Within twenty days after answering, plaintiff's attorneys, to wit, on the 27th day of December, 1912, served an amended summons and complaint on the defendant. To this complaint the defendant answered.

"The case comes on for trial before me at this, the April, term of Court of Common Pleas for Laurens county. After some argument in open Court, counsel for plaintiff and defendant agreed I should mark the case heard, refer it to H. S. Blackwell, Esq., as special referee to take testimony, and that his report should be submitted to me within two weeks. It was also agreed, and the order of reference so provided, that a reference should be held herein on Tuesday, May 13th.

FOOTNOTE.—See *Brookshire v. Farmers' Alliance Exchange*, 71 S. C. 452, 51 S. E. 442, as to call of cases on calendar 2.

"The referee has filed his report, together with a copy of the proceedings, and testimony taken by him.

"Upon an examination of the pleadings, I find and hold that the allegations of paragraph 1 of the complaint are not in issue; that paragraphs 2, 7, 8, 9, 10, 11, 12, 13 and 14 are not denied by the answer of the defendant, and are, therefore, to be considered even in the absence of testimony, as admitted and true. A general denial is interposed to the allegations of paragraphs 3, 4, 5 and 6. These, however, are proven by the testimony.

"By simply referring to these undenied or admitted allegations of the complaint, it appears that the plaintiff is entitled to judgment against the defendant, D. H. Counts, for the full amount sued for, with interest and attorneys' fees, for the foreclosure of the purchase money contract, or chattel mortgage, described therein, and for a sale of the mortgaged property, the machinery and personal property therein mentioned and described.

"Upon consideration of the testimony reported by the said special referee and the pleadings herein, and upon motion of Dial & Todd, plaintiff's attorneys, it is ordered, adjudged and decreed, that the plaintiff, Lummus Cotton Gin Company, have judgment against the defendant, D. H. Counts, for the sum of thirteen hundred and thirty-nine and 20-100 dollars (\$1,339.20), together with the sum of one hundred and twenty-nine and 99-100 dollars (\$129.99), interest due to May 13th, 1913, and together with the further sum of one hundred and forty-six and 91-100 dollars (\$146.91), as attorneys' fees, amounting in the whole to the sum of sixteen hundred and sixteen and 10-100 dollars (\$1,616.10).

"It is further ordered, adjudged and decreed, that the cotton ginning machinery and other personal property hereinafter described, or so much thereof as may be necessary to pay the amount due, with interest and costs, be sold," etc.

Rep.]

April Term, 1914.

The exceptions were as follows:

"1st. Because his Honor, the presiding Judge, erred in not sounding the docket or calling the cases on calendar 2 to ascertain what cases were ready for trial at the April term of Court for Laurens county, 1913.

"2d. Because his Honor erred in calling this case for trial, it being No. 152 on the calendar, after the hour had arrived for the adjournment of the Court for the day, Friday, May 9th, 1913, and just on the eve of the adjournment of the April term of Court *sine die*.

"3d. Because his Honor erred in calling this case peremptorily for trial out of its order on the docket, and ruling that the case must proceed for trial after counsel for defendant had stated:

"(a) That his client was not in Court, and that he was out of the city, having left on the evening train for Columbia;

"(b) And after defendant's counsel had stated that he was fatigued and worn out, having been engaged in trial of jury cases for several days;

"(c) And after the day was over and darkness of night present;

"(d) And after counsel for defendant stated that he was not ready for trial, and did not expect any cases on calendar 2 to be taken up that evening.

"4th. Because his Honor erred in marking the case 'heard' when no testimony had been taken in the case.

"5th. Because his Honor erred in referring the case without consent of the defendant's attorneys to H. S. Blackwell, as special referee, to hold a reference on Tuesday, the 13th day of May, 1913, for the purpose of taking testimony in said case.

"6th. Because the special referee erred in holding a reference in said case without having given four (4) days' notice of said reference.

"7th. Because the said referee erred in not filing his report and testimony with the clerk of Court of Common Pleas for Laurens county.

"8th. Because the special referee erred in filing his report with Hon. Hayne F. Rice, presiding Judge of the Court of Common Pleas for Laurens county, when the said Judge had adjourned said Court *sine die*, and had left the Circuit.

"9th. Because his Honor, the Circuit Judge, erred in holding that counsel for plaintiff and defendant agreed that his Honor, the presiding Judge, should mark the case 'heard,' refer it to H. S. Blackwell, Esq., as special referee, to take testimony, and that his report should be submitted to the presiding Judge within two weeks; and his Honor also erred in holding that it was agreed that a reference should be held in said case on Tuesday, May 13th.

"10th. Because his Honor erred in finding and holding that the allegations of paragraph 1 of the complaint are not in issue.

"11th. Because his Honor erred in holding that the allegations contained in paragraphs 2, 7, 8, 9, 10, 11, 12, 13 and 14, having not been denied by the answer of the defendant, are to be considered, even in the absence of testimony, as admitted and true.

"12th. Because his Honor erred in hearing the said case and trying the issues in said case, and signing and filing a decree and judgment in said case after he had adjourned the April, 1913, term of Court of Common Pleas for Laurens county *sine die*, and had left the Circuit, as he had no power or jurisdiction to try said case and render judgment therein.

"13th. Because his Honor erred in hearing and trying the issues in said case, and signing and filing a judgment and decree in said case, based upon the testimony and proceedings had before H. S. Blackwell, referee, on less than four (4) days' notice, and upon report of said referee, which had not been filed with the clerk of Court of Common Pleas for Laurens county.

REP.]

April Term, 1914.

"14th. Because his Honor erred in hearing and trying said case and signing and filing a decree in said case after he had been notified that the defendant, D. H. Counts, had been adjudicated a bankrupt under the United States bankrupt laws, and enjoined and restrained by his Honor, H. A. M. Smith, U. S. District Judge, from selling and disposing of any of his property, except in the usual course of business.

"15th. Because his Honor erred in ordering and adjudging that the plaintiff, Lummus Cotton Gin Company, have judgment against the defendant, D. H. Counts, for the sum of sixteen hundred and sixteen and 10-100 dollars (\$1,616.10), when it appears that the principal, interest and attorney's commissions on the three notes sued upon and alleged to be due by the defendant, D. H. Counts, amounted to only sixteen hundred and twelve and 46-100 dollars (\$1,612.46).

"16th. Because his Honor erred in ordering, adjudging and decreeing that the defendant's property be sold by the sheriff, and out of the proceeds arising from said sale after deducting the amount of the costs and expenses of this action and of such sale, said sheriff shall pay to the plaintiff, or its attorneys, the amount of the judgment, sixteen hundred and sixteen and 10-100 dollars, when it appeared that the judgment should have been only sixteen hundred and twelve and 46-100 dollars, if the defendant had owed the notes sued upon."

The other facts relative to the questions on appeal are stated in the opinion of the Court.

Messrs. Richey & Richey, for appellant, submit: Cases should be called in order on calendars: Code Civil Proc. 314. Referee's report should have been filed in clerk's office: Circuit Court Rule 16; Code Civil Proc. 332; Civil Code, sec. 3940. Judge lost jurisdiction on adjourning the Court for Laurens county: 30 S. C. 614. Consent to order

of reference, and hearing, not in writing: Circuit Court Rule 14; 71 S. C. 512.

Messrs. Dial & Todd, for respondents, cite: Decree will be referred to date when cause was marked "heard:" 68 S. C. 110; 8 Rich. 164; 35 S. C. 596; 42 S. C. 132; 47 S. C. 34; 103 U. S. 62; 69 S. C. 283. *Denial of knowledge or information as to corporate capacity insufficient:* 8 S. C. 111; 21 S. C. 33; 25 S. C. 309; 26 S. C. 164; 35 S. C. 367; 79 S. C. 383, 564. *Allegations in complaint not denied are admitted:* 35 S. C. 165; Code Civil Proc. 199. *Adjudication in bankruptcy was not final judgment, and was reversed by Circuit Court of Appeals.*

July 7, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

The following statement is taken from the record: "This action was commenced by the plaintiff named above against the defendant named above by the service of a summons and complaint on the defendant on the 22d day of November, 1912. Within twenty days the defendant served his answer in said case. Within twenty days thereafter plaintiff served an amended summons and complaint; and within twenty days thereafter the defendant served his answer to the amended complaint. The pleadings were made up on January 16th, 1913, and were all verified. The case was placed on calendar 2 of the Court of Common Pleas for said county for the April (1913) term of said Court, and was No. 152 on the docket. Only two weeks is provided by law for the April term of the Court of Common Pleas for said county. The whole of the second week, up to the usual hour of adjournment on Friday, was taken up with the trial of jury cases. Some time during the morning session on Friday the presiding Judge announced in open Court that, on account of sickness in his family,

REP.]

April Term, 1914.

he would not hold Court on Saturday (the next day). After the usual hour for adjournment on Friday, but while the Court was still in session, the presiding Judge, at the request of plaintiff's counsel, called this case up for disposition, plaintiff's counsel asking that it be heard. Defendant's attorney strenuously objected to going on trial, stating that he was very tired; that his client was not then in town; that his client had been adjudged a bankrupt and enjoined from disposing of his property, etc., etc. Plaintiff's attorney insisted on a trial, stating in substance that he had fully apprised defendant's attorney of his intention to press for trial at this term at the first opportunity, etc., etc.; that defendant lived in the city of Laurens, and that he, plaintiff's counsel, had seen him in town that day. After considerable discussion of the matter by counsel on both sides, other than is set out above, the Court announced that the case would have to go to trial. The decree states what further occurred."

In settling the "Case," the presiding Judge reported: "In justice to the presiding Judge for making what appears to be a very summary disposition of the case, it should be stated that I was impressed by what passed before me between counsel engaged in the case with the idea that the defendant had no defense, but was fighting for delay. For my own satisfaction, I called upon Mr. Richey, Sr., who was in charge of the case, to state whether or not it was his opinion, from what he knew of the case, that the defendant had a good defense. Mr. Richey would not answer this inquiry in the affirmative, but said he did not know. This incident served to confirm the opinion already formed. The Court was not called to hear any other matter on calendar 2. The day of reference was fixed early in the week to suit the convenience of Mr. Richey, Sr., who stated that he would be out of town the latter part of the week."

In cases too numerous to mention, it has been held that matters pertaining to the trial of causes, including the

hours of the sessions of the Court, and the granting or refusing of motion for continuance, either within or

1 beyond the term, are in the discretion of the trial Court, and that the exercise of that discretion will not be interfered with by this Court, unless it is clearly made to appear that it was abused, in other words, that the exercise of it was manifestly erroneous and prejudicial to the appellant.

The issues having been made up by the pleadings, the case was properly docketed for trial, and no other or further notice that it would be called for trial was necessary (Code

Proc., sec. 314), although it seems that plaintiff's

1a attorney did give defendant's attorneys ample and timely notice that he would press for trial at the next ensuing term. While cases usually are, and, as a rule, ought to be disposed of in the order in which they are placed on the calendar, those first on the calendars having the prior right of trial, yet this rule is not invariable or absolute. The trial Judge should be allowed some discretion in dispatching the business of the Court. At any rate, it cannot be successfully contended that a defendant in a cause at the foot of one of the calendars has any right to demand that every case ahead of his shall be disposed of before his can be tried. Those ahead of him may waive their priority of right to trial. In this instance, they appear to have done so, as none of them were in Court demanding their priorities, or are now complaining. The defendant has no right to complain, because, by their failure to do so, his case was reached and ordered to trial sooner than it otherwise would have been, unless by relying, in good faith and for good and sufficient reasons, upon the belief that the cases ahead of his would be tried, he was caught unawares and unprepared for trial. If this had been so, he should have made it appear by affidavit. But such was not the fact, for the plaintiff had given him timely notice that he would press for a trial at the first opportunity. Moreover, the defend-

Rep.]

April Term, 1914.

ant did not attempt to show that he would suffer any legal prejudice by having his case ordered to trial. His attorney stated that defendant was out of the city, but he did not say that he wanted to use him as a witness, or that he needed him at the trial for any other purpose, and could not safely proceed in his absence. On the contrary, when asked by the Court if he had a meritorious defense, he said he did not know, and, notwithstanding opportunity was afterwards given him to prove any defense available to him under the pleadings, he offered no evidence whatever; and has not offered any good reason for his failure to do so. To reverse a judgment, under such circumstances and for such reasons, would bring the administration of justice by the Courts into merited contempt. This disposes of the first

three exceptions. But every good ground raised by

2 these exceptions was waived, when the appellant agreed that the case should be marked "heard," and that it should be referred to a special referee to take and report the testimony to the presiding Judge, the date of the reference being fixed in the order by his consent and for his convenience. It necessarily followed that the decree

was to be based upon the testimony so taken and

3 reported, just as if the case had actually been heard by the Judge in open Court, and his decision reserved.

Roberts v. Wessinger, 69 S. C. 283, 48 S. E. 248. The consent of defendant's attorney to marking the case "heard," and to the order above referred to, concludes him as to the points raised by the 4th, 5th, 6th, 7th, 8th, 9th, 12th and 13th exceptions.

Appellant contends, however, that he did not, in fact, agree that the case be marked "heard," or consent to the order of reference. Perhaps, it would be more accurate to

say that his contention is that the record does not

4 show affirmatively that he did so agree and consent, except the statement of the Circuit Judge in his decree that he did, and the statement of the plaintiff's attor-

ney to that effect before the referee, which was made in response to defendant's objections to the reference. The statements of both attorneys as to that matter were taken down by the referee, and reported to the Court. The appellant relies upon rule 14 of the Circuit Court, to wit: "No agreement or consent between the parties, or their attorneys, in respect to the proceedings in a cause shall be binding, unless the same shall have been rendered to the form of an order by consent and entered; or unless the evidence shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel; or unless made in open Court and noted by the presiding Judge or the stenographer on his minutes by the direction of the presiding Judge."

It will be seen that the rule applies to all agreements and consents between the parties or their attorneys, whether made in or out of Court. But it will be noted also that the rule makes a material difference between those made out of Court and those made in Court. The latter need not be in writing, but need only be noted by the presiding Judge, or by the stenographer, under his direction. It does not appear that the agreement in question was not noted by the presiding Judge. Nothing appearing to the contrary, we are bound to presume that it was. *Ex parte Pearson*, 79 S. C. 302, 60 S. E. 706. Moreover, it may be inferred from the record that it was, in fact, noted by the Judge, since he mentioned it in his decree.

In the first paragraph of the complaint, the corporate existence of the plaintiff is alleged. In the first paragraph of the answer it is denied, as follows: "The defendant alleges that he has neither 'knowledge nor information sufficient to form a belief as to the truthfulness of the allegation contained in paragraph one of the complaint, and therefore denies the same.'" This amounts to nothing more than a general denial, and does not put in

REF.]

April Term, 1914.

issue the plaintiff's corporate existence or capacity to sue. *Steamship Co. v. Rogers*, 21 S. C. 27.

The second paragraph of the answer admits the allegation of the second paragraph of the complaint. The third denies the allegations of paragraphs 3, 4, 5 and 6 of the complaint. Nothing at all is said as to the allegations contained in the other paragraphs of the complaint. Section 219 of the Code of Procedure provides that every material allegation of the complaint not controverted by the answer, as prescribed in section 199, shall, for the purposes of the action, be taken as true. It follows that there was no error in taking as true all the allegations of the complaint, except those contained in paragraphs 3, 4, 5 and 6.

The statement by defendant's attorney that defendant had been adjudged a bankrupt by the Federal Court and enjoined from disposing of his property and the exception based thereon need not be considered, as it turned out that the order was reversed, as having been erroneously made.

Upon calculation of the amount due on the notes sued on, we find an error of \$2.05 against the defendant. In other words, the judgment was too great by that amount, and must be reduced accordingly. It is, therefore, the judgment of this Court that the judgment of the Circuit Court be reduced in amount two and 05-100 dollars, and that, so reduced, it be affirmed.

8870

STATE v. RICHARDSON.

(82 S. E. 353.)

CRIMINAL LAW. ENTRY AFTER NOTICE ON LANDS OF ANOTHER.
DEFENSES. MAGISTRATE'S JURISDICTION. APPEAL AND ERROR.

1. Under Cr. Code 1912, sec. 94, providing that the party appealing from a magistrate's Court shall serve a notice of appeal stating the

ground thereof, section 95, requiring the magistrate to file in the office of the clerk of Court such notice with the record and statement of all proceedings in the case and the testimony in writing taken at the trial, and signed by the witnesses, and section 98, providing that the appeal shall be heard by the Court of General Sessions upon the grounds of exceptions made, and upon the papers thereinbefore required, without the examination of witnesses in such Court, affidavits submitted by accused when his appeal was heard in the Circuit Court, contradicting the magistrate's report of the testimony, constituted no part of the proceedings upon which the appeal was to be heard, and the Court properly refused to consider them.

2. Code Civ. Proc. 1912, sec. 407, providing, relative to appeals to the Circuit Court from an inferior Court, that if the appeal is founded on an error of fact not affecting the merits of the action, and not within the knowledge of the magistrate, the Court may determine the alleged error of fact on affidavits, or, in its discretion, upon examination of witnesses, does not apply to criminal cases in view of section 8, which provided that that Code is divided into two parts, and that the first relates to Courts of justice and their jurisdiction, and the second to civil actions; section 407 being in the second part.
3. Code Civ. Proc. 1912, sec. 88, providing that in every action brought in a Court of magistrate, where the title to real property shall come in question, defendant may set forth in his answer any matter showing that such title will come in question, and that the magistrate shall thereupon countersign the answer and deliver it to plaintiff, does not apply to criminal cases, and the magistrate in a criminal case properly refused to countersign the answer.
4. In a prosecution for unlawful entry on lands of another, the magistrate's Court is not deprived of jurisdiction by tender of issue as to title.

Before C. J. RAMAGE, special Judge, St. George, September, 1913. Affirmed.

Prosecution for unlawful entry, after notice, on lands of another. The defendant, John Richardson, Jr., being convicted in the magistrate's Court, appealed to the Court of General Sessions, which affirmed the judgment of the magistrate. Defendant then appealed from the judgment of the Court of General Sessions. The facts are stated in the opinion.

REF.]

April Term, 1914.

Mr. Legare Walker, for appellant, submits: *The affidavits submitted to the Circuit Court at hearing of appeal to show error in statements of fact in the magistrate's return should have been considered by the Court: Code Civil Proc., secs. 406, 408; Crim. Code 98, 102; 64 S. C. 224; 74 S. C. 443; 80 S. C. 92; 64 S. C. 408. Provision for further return by magistrate: Sec. 403, Code Civil Proc., inapplicable. Has defendant in criminal prosecution right to raise question of title, and so oust the magistrate of jurisdiction? Code Civil Proc., secs. 88 and 89; Criminal Code, sec. 241. Code Civil Proc., sec. 87, distinguished; 35 S. C. 266, distinguished; 63 S. C. 22, questioned.*

Mr. Solicitor Hildebrand and Mr. W. A. Holman, for respondent.

July 9, 1914.

The opinion of the Court was delivered by MR. JUSTICE GARY.

The defendant, John Richardson, Jr., was convicted before a magistrate for violating section 241 of the Criminal Code, which provides that every entry upon the lands of another, after notice from the owner or tenant prohibiting the same, shall be a misdemeanor. The sentence imposed upon him by the magistrate was that he pay a fine of \$50, or serve 30 days at hard labor on the public works of the county. He appealed from the sentence to the Circuit Court; but his appeal was dismissed, whereupon he appealed to this Court.

The first question that will be considered is whether there was error on the part of his Honor, the presiding Judge, in refusing to consider certain affidavits.

The magistrate, in his report of the testimony, stated that Joseph Bivens, a witness for the State, testified that he had given notice to the defendant not to enter upon his lands

for any purpose. When the appeal was heard in the Circuit Court, the appellant submitted the affidavit of Rene Ravenel and five other persons to the effect:

"That he was present at the trial of this case before J. E. Carroll, magistrate; that Joseph Bivens testified, not only once but several times, that he had given notice to John Richardson, Jr., not to enter upon any of his lands to survey the same; that his attorney, Mr. Holman, endeavored to get him to say that he had given an unqualified notice not to enter, but he did not testify to this."

As it did not appear from the record what position the presiding Judge took in regard to the affidavits submitted to him, the matter was brought to his attention, and he filed the following order:

"In passing on the above case, certain affidavits were presented by counsel for defendant. In my discretion, I refused to consider said affidavits, but based my judgment on the testimony taken before the magistrate."

Section 94 of the Criminal Code provides that the appellant shall serve notice of appeal on the magistrate within five days after sentence.

Section 95 thereof is as follows:

"Within ten days after said service the said magistrate shall file in the office of the clerk of the Court the said notice, together with the record and statement of all proceedings in the case, and the testimony in writing taken at the trial and signed by the witnesses."

Section 98 thereof is as follows:

"The said appeal shall be heard by the Court of General Sessions upon the grounds of exceptions made, and upon the papers hereinbefore required, and without the examination of witnesses in said Court. And the said Court may either confirm the sentence appealed from, reverse or modify the same, or grant a new trial, as to the Court may seem meet and conformable to law."

REP.]

April Term, 1914.

It will thus be seen that the affidavits constituted no part of the proceedings upon which the appeal was to be heard, and that there was no error on the part of the presiding Judge in refusing to consider them.

2 It is true section 407 of the Civil Code provides:

"If the appeal is founded on an error in fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the magistrate, the Court may determine the alleged error in fact on affidavits, and may, in its discretion, inquire into and determine the same upon examination of the witnesses."

There are several reasons, however, why said provision is inapplicable to the case under consideration, one of which is that this is a criminal proceeding. Section 8 of the Code of Civil Procedure is as follows:

"This Code of Procedure is divided into two parts: The first relates to Courts of justice and their jurisdiction; the second relates to civil actions in the Courts of this State."

Section 407 is included in the second part of the Code of Procedure. *State v. Pitts*, 12 S. C. 180, 32 Am. Rep. 508; *State v. Reynolds*, 48 S. C. 384, 26 S. E. 679.

The exceptions raising this question are overruled.

The next question that will be considered is

3 whether there was error on the part of the presiding Judge in overruling the following ground of appeal:

"Because the magistrate erred in refusing to countersign the answer of defendant at the time he was requested so to do; the error being that section 88 of volume II of the Code of Laws of S. C., 1912, requires the magistrate to countersign such answer."

Section 88 is as follows:

"In every action brought in a Court of magistrate where the title to real property shall come in question, the defendant may, either with or without other matter of defense, set forth in his answer any matter showing that such title

will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the magistrate. The magistrate shall thereupon countersign the same and deliver it to the plaintiff."

The case of *State v. Holcomb*, 63 S. C. 22, 40 S. E. 1017, sustains the ruling of the presiding Judge.

See, also, *State v. Green*, 35 S. C. 266, 14 S. E. 619.

This Court, upon the request of the appellant's attorney, granted him permission to review the case of *State v. Holcomb*, 63 S. C. 22, 40 S. E. 1017. After careful consideration, we adhere to the rule therein stated.

These conclusions practically dispose of all the exceptions. Appeal dismissed.

8871

GWATHNEY ET AL. v. BURGISS.

(82 S. E. 394.)

SALES FOR FUTURE DELIVERY. PLEADING. JOINDER OF CAUSES OF ACTION.

1. Under Code Civil Proc., sec. 218, a cause of action on an account stated may be joined in same complaint with a cause of action on an open account arising out of the same transactions, and a motion to strike out the cause of action on the account stated is properly refused.
- 1a. In an action on an open account, plaintiff must prove each item, and cannot recover interest except by express agreement, while, in an action on an account stated, he may recover upon proof that defendant agreed to the account as stated, and may, under Civ. Code 1912, sec. 2516, recover interest; hence a third cause of action on an account stated, based on practically the same facts as those alleged in the first two causes of action, which averred that there was an open account between the parties, will not be stricken on the ground of redundancy.
2. A demurrer to a complaint to recover for breach of contracts for sale for future delivery is properly overruled where the allegations are susceptible of an inference that shows it to have been the *bona fide* intention of the parties to the contracts, at the time they were made, that the goods should be sold and delivered in kind at the future time specified in the contract.

REP.]

April Term, 1914.

3. In an action by a broker against his principal for reimbursement for losses in purchases and sales of cotton for future delivery, it is immaterial that the names of the parties to contracts are not given, where it is alleged that both buyer and seller had the required intention as to *bona fide* delivery.
- 3a. Where defendant failed to furnish cotton brokers with whom he had had transactions with sufficient funds to indemnify themselves on purchases and sales made for his benefit, the brokers were not bound to carry his contracts to maturity; it being the duty of the principal to indemnify his agent.
4. That brokers, through whom defendant dealt in cotton for future delivery, closed out his transactions upon his failure to deposit sufficient margins, does not show that defendant had no intention of receiving and delivering the actual cotton, thus rendering the contract bad under Civ. Code 1912, sec. 8421, denouncing dealings in futures.
5. A demurrer admits the allegations of a pleading attacked.
6. In an action by a broker who suffered loss upon contracts entered into for a customer for the sale and purchase of cotton in the future, where different inferences as to whether the transactions constituted dealings in futures, denounced by Civ. Code 1912, sec. 8421, could be drawn from the allegations of the complaint admitted by the demurrer, the complaint is good; the questions being for the jury.
7. Under Civ. Code 1912, sec. 8421, providing that every contract for the sale or transfer at any future time of any cotton, etc., shall be void, unless it is the intention of both parties to the contract that the cotton shall be actually delivered, a broker who entered into contracts on behalf of defendant for the future sale and purchase of cotton cannot recover thereon, where defendant had no intention of actually receiving or delivering the cotton.

Before MEMMINGER, J., Spartanburg, April, 1913. Affirmed.

Action by Archibald B. Gwathney, Jr., William Mitchell, Robert C. Cairns and Edward E. Bartlett, Jr., copartners trading as Gwathney & Co., against J. F. Burgiss. From an order refusing to strike out the third cause of action, and overruling a demurrer to the complaint, defendant appeals.

The pleadings are substantially stated in the opinion.

FOOTNOTE.—See also case of *Maybank & Co. v. Rodgers*, *post*, in this volume.

The grounds of demurrer were as follows:

The defendant hereby reserves the right to make the motion heretofore noticed to strike out portions of the complaint as irrelevant and redundant.

The defendant herein demurs to the 2d and 3d causes of action set out in the complaint, because the same do not state facts sufficient to constitute a cause of action for the following reasons:

1st. Because said causes of action allege that the contract for the sale of five hundred bales of cotton for delivery in May and the contract for the purchase of two hundred bales of cotton for delivery in March was a *bona fide* transaction, with the intention on both sides that the actual cotton should be delivered in March and May, respectively; that the plaintiffs closed out both of said contracts on the 4th day of January, long prior to the time when they matured, without the authority or consent of the defendant, and therefore in violation of his rights, and therefore the plaintiffs can have no claim against the defendant on account thereof. If these were *bona fide* transactions, the plaintiffs could have no right of action, unless they perform their part of said contracts and carry same to maturity. Having violated the contract by closing it out before the time stipulated, they could have no cause of action.

2d. Because it is alleged in said causes of action that the plaintiffs closed out the March and May contracts, mentioned therein, because the defendant refused to put up \$1,500.00 as margins to cover same, and the allegations in said causes of action in this connection conclusively show that it was not the *bona fide* intention of the plaintiffs, much less of the defendant, that the actual cotton should be delivered in March and May, respectively, therefore said contracts were in violation of the law of this State against gambling in futures, and were null and void.

REP.]

April Term, 1914.

3d. The defendant further demurs to the whole complaint on the ground that it does not state facts sufficient to constitute any cause of action for the following reasons:

It appears from the complaint that all the transactions, out of which the alleged causes of action grew, were for the future sale and delivery on one side and the purchase and acceptance on the other of cotton; that the plaintiffs were acting as agents for the defendant, and that it was the *bona fide* intention of themselves, as agents, that the cotton should be delivered and received in kind, and there is no allegation in the complaint that it was the *bona fide* intention of the defendant to either deliver or receive the cotton in kind, or that defendant had authorized said agents to do the things alleged in the complaint with any such *bona fide* intention; that the complaint shows by section XLIV (44) thereof that it was not the intention of the plaintiffs to hold the March and May contracts open until they matured, so that the actual cotton should be delivered, because the plaintiffs called for "margins" on January 3d, and, without authority from the defendant, closed them out, showing conclusively that it was not the intention of the plaintiffs that the cotton should be delivered in March and May, respectively, but that they were what are known as future contracts or gambling in futures. The acts of the plaintiffs alleged in this connection show conclusively that they had no such *bona fide* intention for delivery of the actual cotton.

4th. Because it appears from the complaint all the way through that plaintiffs purchased and sold the contracts "in their own name and without disclosing defendant's name;" that it thus appears that said Gwathney & Co. on one side, and somebody else, not named, on the other, were "seller and buyer," and that the defendant had nothing to do with the "selling and buying;" that in this action it is Gwathney & Co., plaintiffs, and Burgiss, defendant, who are before this Court; that there is no allegation that the defendant had any *bona fide* intention to receive or deliver the cotton

in kind; that there is no allegation that the defendant ordered the cotton bought or sold under the rules of the New York Cotton Exchange.

That the whole complaint alleges that the plaintiffs and some one, not named, were the "seller and buyer," and there is no allegation that the defendant had any intention that the actual cotton should be delivered at any time, and an agent who advances money for a principal to buy or sell future contracts cannot recover same, under the circumstances and facts alleged in the complaint.

Messrs. Johnson, Nash & Daniel, for appellant, cite: *As to refusal to strike out third cause of action*: Civil Code 3425; 45 S. C. 367, 368; 71 S. C. 345. *As to first and second causes of action*: 54 S. C. 382; Civil Code, sec. 3421; 149 U. S. 481; 37 L. Ed. 820 and 110 U. S. 499, 510, distinguished; 45 S. C. 368, 369; 54 S. C. 385; 72 S. C. 35; 50 S. C. 537. *Rules of exchange*: 58 S. C. 211. *Conflict of laws, what statute governs*: 9 Cyc. 674; 45 S. C. 344, 369; 2 Kent. Com. 458; Clark Contracts 502, *et seq.*; 3 Am. & Eng. Enc. of L. 554; 58 N. J. Eq. 219; 2 Hill 319; 1 Strob. 82; 9 Rich. 262. *Transactions not interstate commerce*: 209 U. S. 406; 52 L. Ed. 855. *Stats. at Large*: 1907, p. 614; Crim. Code, 1912, secs. 263 to 270; Civil Code, 1912, secs. 3421 to 3425. *Contracts not protected by Constitution*: 187 U. S. 606; 47 L. Ed. 323; 8 Cyc. 887; 184 U. S. 425; 50 L. R. A. 763; 69 S. C. 527; 21 L. R. A. 789; 46 Law Ed. 623.

Messrs. Sanders & DePass and John R. Abney, for respondent, cite: *Joinder of causes of action on open account for original debt with cause of action on account stated proper*: 1 Saunders on Pl. & Ev. 42; 17 Abb. Pr. 340; 1 App. Div. 610. *Account stated*: 4 Cranch. 306, 309. *Demurrer as to first and second cause of action properly overruled*: 149 U. S. 481, 498; 62 N. Y. 535, 540,

REP.]

April Term, 1914.

542A; 55 N. Y. 425; 67 N. Y. 138, 145; 63 N. Y. 370, 396; 217 Pa. 173; 135 Fed. 47; 198 U. S. 236, 249; 137 App. Div. 110; 202 N. Y. 603. *The demurrer so far as it relates to the whole complaint, was properly overruled: Moak's Van Santvoord's Pleadings* (3 ed.) *652; 10 How. Pr. (N. Y.) 222; 54 Misc. (N. Y.) 152. *As to contracts in names of plaintiffs:* 19 N. Y. 170; 149 U. S. 481, 489; 198 U. S. 236, 247; 137 App. Div. (N. Y.) 110; 202 N. Y. 603. *These transactions are excepted by the statute of South Carolina, upon which the demurrer is based, as the orders and reports of execution and result were between citizens of different States, and the transactions were by mail and wire:* Stats. 1907, pp. 614-16. *The contracts are New York contracts, and the statutes of South Carolina do not apply to them:* 83 U. S. 314; 91 U. S. 406.

July 13, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

This action was brought to recover a balance alleged to be due to plaintiffs from defendant, arising out of dealings in cotton futures on the New York Cotton Exchange by plaintiffs as agents of defendant. The plaintiffs state their case in three causes of action. The complaint is too long to report in full. It contains a good deal of repetition in stating the details of the various transactions, so that we shall state only the substance of the allegations, omitting formal allegations and such as are not material to the consideration of the question made by the appeal.

The facts alleged are: Plaintiffs are cotton commission merchants and brokers of the city of New York and members of the New York Cotton Exchange. Defendant is a resident of Spartanburg, S. C. The purchases and sales hereinafter mentioned were made by plaintiffs for defendant, as his agents, subject to the by-laws, rules and regulations of said exchange. Except those of January 4, 1912,

which will be specially noticed later, each was made at the request of defendant, and he was promptly notified of each by wire and mail, and also of the results of the transactions, as they were closed out by statements, showing the details of the transactions, including the deduction or addition of the commissions which plaintiffs were entitled to charge under the rules of the exchange. Each purchase and sale was made in the name of the plaintiffs, without disclosing the name of the defendant. The foregoing facts are stated in each cause of action to which they are appropriate. The intention of the parties as to the transactions is alleged in the following language: "It was the *bona fide* intention of both parties—seller and buyer—at the time of making such contract that the cotton should be actually delivered and received in kind at the future period mentioned, and certainly such was the *bona fide* intention of plaintiffs, as agents for defendant."

The transactions set up as the first cause of action were as follows:

1. Aug. 24, 1911, bought 100 bales for January, 1912, delivery. Sept. 8, 1911, closed this transaction by selling 100 bales for January, 1912, delivery, making for defendant \$110.00.

2. Aug. 25, 1911, bought 100 bales for October delivery. Aug. 28, 1911, bought 100 bales for October delivery. Sept. 5, 1911, closed these transactions by selling 200 bales for October delivery, making for defendant \$40.00.

3. Sept. 29, 1911, sold 400 bales for December delivery. Oct. 7, 1911, closed this transaction by buying 400 bales for December delivery, making for defendant \$820.00.

4. Sept. 30, 1911, sold 100 bales for October delivery. Oct. 11, 1911, closed this transaction by buying 100 bales for October delivery, making for defendant \$295.00.

5. Oct. 16, 1911, sold 200 bales for May, 1912, delivery. Oct. 28, 1911, closed this transaction by buying 200 bales for May, 1912, delivery, making for defendant \$100.00.

REP.]

April Term, 1914.

6. Nov. 26, 1911, sold 400 bales for May, 1912, delivery. Dec. 13, 1911, closed this transaction by buying 400 bales for May, 1912, delivery, making for defendant \$340.00.

7. Dec. 13, 1911, bought 100 bales for May, 1912, delivery. Dec. 18, 1911, closed this transaction by selling 100 bales for May, 1912, delivery, making for defendant \$65.00.

8. Sept. 13, 1911, bought 200 bales for January, 1912, delivery. Dec. 28, 1911, closed this transaction by selling 200 bales for January, 1912, delivery, losing for defendant \$2,680.00.

The difference between the sum of the previous gains and the loss on this transaction is \$910.00, payment of which was duly demanded of defendant and refused.

The following transactions are set up as the second cause of action:

Dec. 18, 1911, sold 500 bales for May, 1912, delivery. Dec. 29, 1911, bought 200 bales for March, 1912, delivery. While plaintiffs were carrying these contracts, defendant became indebted to them, as stated in the first cause of action, in the sum of \$910.00. In the meantime, the price of cotton for May and March deliveries so rose that on January 3, 1912, these contracts showed a loss of \$510.00, which, with plaintiffs' commissions, \$105.00, and the previous loss of \$910.00, amounted to \$1,525.00. Thereupon, plaintiffs demanded of defendant a remittance of \$1,500.00 to cover these losses and their commissions in part. Their demand was refused. Thereupon, plaintiffs notified defendant that unless they were notified by 11:45 o'clock the next day that remittance of said sum had been made they would liquidate said contracts. Defendant failed to make the remittance, and, on January 4, 1912, plaintiffs closed these transactions by buying 500 bales for May, 1912, delivery, and by selling 200 bales for March, 1912, delivery, the former resulting in a loss to defendant of \$675.00, and the latter in a gain of \$180.00, the net result being a loss to

defendant of \$495.00, which, with the previous loss of \$910.00, makes \$1,405.00, for which judgment is demanded against defendant.

In the third cause of action, the transactions of the first and second causes of action are set up as a cause of action on an account stated, it being therein alleged that the account between the parties was stated on January 4, 1912; that it was found that the sum of \$1,405.00 was then due to plaintiffs from defendant; and that defendant agreed to said statement of the account and promised to pay the same, but no part thereof has been paid.

The defendant moved to strike out the third cause of action as irrelevant and redundant, and demurred to the first and second causes of action, and, also, to the whole complaint for insufficiency. The motion was refused, and the demurrer was overruled.

The ground of the motion to strike out the third cause of action is that it was merely a repetition of the facts of the first and second, and, therefore, redundant. This

1, 1a ground is not well taken. There is this difference:

The first and second causes of action are based upon items of an open account, while the third is upon an account stated.

There are material differences in the rights of the parties in an action on an open account, and in an action on the same account, as an account stated. Some of them are: In the first, plaintiff must prove each item of the account, and cannot recover interest, except, in equity, under peculiar circumstances, or upon an express agreement to pay interest. In the second, he may rest his case upon proof that defendant agreed to the account, as stated, and promised to pay it, and interest is recoverable on such an account by statute. Civ. Code, sec. 2516. There are also differences in the defenses which are available under a general denial in the two cases.

REP.]

April Term, 1914.

It is permissible, under section 218 of the Code of Procedure, to join in the same complaint, a cause of action on open account and one on the same account, as an account stated, as both causes of action arise out of contract. In such a case, if the plaintiff fails to prove the cause of action on the account stated, he may, nevertheless, recover on the open account. The motion was, therefore, properly refused.

The grounds of demurrer are long and argumentative in form. We shall not state them here, as they will be reported. They make the point that, notwithstanding the allegations of the complaint, as to the intention of 2, 7 the parties thereto, the transactions therein stated fall under the ban of the statute of this State (sec. 3421 Civ. Code, 1912, being sec. 2310 Civ. Code, 1902), which declare such contracts void, unless (one of the exceptions mentioned in the statute) it is the *bona fide* intention of both the parties to the contract, at the time of making the same, that the cotton, or other thing bought or sold, shall be actually delivered and received in kind at the future period mentioned. Defendant's contention is based upon an inference from the facts stated in the complaint. It is argued that the allegation of intention as to the May and March contract is conclusively shown to be untrue, because plaintiffs closed out said contracts, on January 4, 1912, before they matured, without authority from defendant, and, therefore, in violation of his rights; hence they have no cause of action; that if they were *bona fide* transactions, plaintiffs would have no right of action, unless they performed their part of the contracts, and carried them to maturity. This argument is faulty in several aspects: 1. It overlooks the reason why the contracts were closed out, to wit, the refusal of the defendant, after demand, to indemnify the plaintiffs, his agents, against loss. The principal impliedly agrees to indemnify his agent against liability for loss incurred in consequence of acts done in pursuance of the agency, and

to reimburse him for losses sustained in the execution of the agency. *Bibb v. Allen*, 149 U. S. 481; 13 Sup. Ct. 950; 31 Cyc. 1532; Mecham on Agency, secs. 653, 977, 1031. 2. It assumes that, if the contracts were valid, it was the duty of the plaintiffs to carry them to maturity, which they were not bound to do, for the reason just stated. 3. It assumes that the only inference to be drawn from closing out the contracts is that there was no intention, when they were made, to perform them by actual delivery of the cotton. But the closing out of the contracts is not necessarily inconsistent with the intention alleged. When the defendant practically repudiated the contracts by refusing to indemnify the plaintiffs, they had the right to do whatever was reasonably necessary to protect themselves against further possible loss. There was one way, if not the only way, by which they could certainly do this, and that was adopted by the plaintiffs. They had sold and agreed to deliver 500 bales in May. To enable themselves to perform that contract, they bought 500 bales to be delivered to them in May, so that they would have the cotton to deliver to the person to whom they had sold it. And they had bought and agreed to receive for defendant 200 bales in March. Not wanting it themselves, they sold 200 bales for March delivery, so that they could have some one to whom they could deliver it, when it was delivered to them. And so, the two transactions were liquidated, without further loss either to the plaintiffs or the defendant. 4. It ignores the allegation of intention, the truth of which is admitted by the demurrer. No doubt, if the facts stated and admitted to be true are susceptible of only one reasonable inference, it is one of law for the Court; but, where they admit of more than one inference, as we have shown they do in this case, no matter how strong or convincing one of them may be, it is the province of the jury to say which is the correct inference. As said by the Supreme Court of the United States, in *Irwin v. Williar*, 4 Sup. Ct. Reporter 499; 110 U. S. 499, 510: "We do

REP.]

April Term, 1914.

not doubt that the question whether the transactions came within the definition of wagers is one that may be determined upon the circumstances, the jury drawing all proper inferences as to the real intent and meaning of the parties; for as was properly said in the charge: 'It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade.' It might, therefore, be the case, that a series of transactions, such as that described in the present record, might present a succession of contracts, perfectly valid in form, but which, on the face of the whole, taken together and in connection with all the attending circumstances, might disclose indubitable evidence that they were mere wagers. The jury would be justified in such a case, without other evidence than that of the nature and circumstances of the transactions, in reaching and declaring such a conclusion."

The next point is that there is no allegation that defendant had, at the time of making the contracts, the intention prescribed by the statute, as a condition of their validity. The allegation is that both parties to the contracts—"seller and buyer"—had the required intention. It is further alleged that, in making each contract, the plaintiffs were the agents of defendant. Therefore, the defendant was a party to each contract—as seller or buyer. The allegation was intended to apply to him in the relation which he actually bore to the respective transactions, as well as to the other parties thereto, though they are not named. But the fact that they are not named is not material. That is evidentiary. They are not before the Court. The plaintiffs further allege that their own intention, as agents of the defendant, was as required by the statute. But whether they so intended or not, the defendant is not liable, unless he had the required intention. *Riordan v. Doty*, 50 S. C. 537, 27 S. E. 939; *Harvey v. Doty*, 54 S. C. 382, 32 S. E. 501.

These views make it unnecessary to consider the grounds relied upon by the plaintiffs in the Circuit Court in opposition to the demurrer, and, in this Court, to sustain the order appealed from, which is affirmed.

Affirmed.

MR. CHIEF JUSTICE GARY and MR. JUSTICE WATTS concur in the judgment of the Court.

MR. JUSTICE FRASER, *dissenting*. I dissent. This is an action by the plaintiff against the defendant for failure to pay losses on various contracts for future delivery of cotton. The plaintiff alleges that on the 24th day of August, 1911, he (plaintiff), on the order of the defendant, bought, in his own name on the New York Exchange, one hundred bales of cotton for delivery in January, 1912. That thereafter, on the 5th day of September, 1911, the defendant, by telegram, directed the plaintiff to *close out* said transaction by selling one hundred bales of cotton for said January delivery. That on the 8th of September, 1911, plaintiff *closed out* said transaction by selling one hundred bales of cotton. That in the same manner, on 25th of August, 1911, he bought one hundred bales of cotton, in his own name, for the defendant, for delivery in October, 1911, and on the 28th of August, 1911, he bought another one hundred bales for the defendant for October delivery, and on the 5th September, 1911, by the defendant's direction, the plaintiff closed out said transaction by a sale of two hundred bales of cotton for October, 1911, delivery.

There is no use to go through all the transactions set out, they are of the same nature. The plan is to buy one hundred bales of cotton and then before the time for delivery, one hundred bales are sold. If it is the same cotton or the same parties, the complaint does not say so. When the plaintiff buys or sells for the defendant, the name of the other principal is not given. When a merchant in legiti-

REP.]

April Term, 1914.

mate business makes a contract to buy goods and then makes a contract to sell goods, he is doing business, not closing out his business. Here, when the defendant buys 100 bales of cotton and then sells 100 bales of cotton, the transaction is closed. The defendant has made two contracts to do two things and therefore he is not required to do either. According to the complaint, the contract to deliver in January was "closed out" by the contract to receive in January. What possible connection in real business can there be unless there is an agreement to offset the sale against the purchase? There is no such obligation here. The statutes of this State make all contracts for future delivery void with three exceptions:

1. Where the seller is the owner of the cotton, or
2. Authorized by the owner to sell, or
3. It was the *bona fide* intention of both parties, at the time of making the contract, that the cotton should be sold and delivered in kind at the future time specified in the contract.

The plaintiff seeks to recover under No. 3. The allegations, however, reiterated time and again, are, that the second contract closed out the first contract. The effect of the making of the second contract in every series was to annul the first and relieve the defendant of all obligation except to pay or receive the differences. This complaint alleges a demand for the differences and not a demand for delivery or receipt of the cotton. If the plaintiff had *bona fide* contracts to deliver and receive cotton, then the failure to deliver and receive the cotton is the breach of the contract and there is no allegation of a failure to deliver or receive cotton. Even if the allegation of a *bona fide* intention to deliver and receive is a sufficient allegation of a legal contract, no breach of it has been alleged, and, therefore, no cause of action has been stated.

It will be observed further that the allegation of *bona fides* is not made as to all the purchases and sales. Paragraphs

34 and 36 constitute one group. The complaint unites these two transactions as one and makes the allegation of *bona fides* only as to the purchase. The allegation of loss is as to the combined contracts and there is no allegation of loss as to the purchase alone. Even supposing that the allegation of *bona fides* is sufficient to sustain an action for loss on the purchase, yet there is no allegation of *bona fides* as to the contract of sale, and the contract of sale is illegal (see Code, 1912, section 3425), and when the complaint bases the right to recover on the result of two contracts, one legal and the other illegal, then the result is bound to be tainted with illegality and unenforceable, *i. e.*, the complaint has not stated a cause of action. Indeed the allegation as to a *bona fide* intention, to receive and deliver, could not have been made as to the sale because the contract of sale is alleged to have "closed out the transaction." There could therefore have been no intention to deliver or receive on the second contract of this series. It will be observed that in the first and second causes of action the allegation of *bona fides* is alleged as to only one part of one series of purchase and sale. Each cause of action must be complete in itself.

The third cause of action is for an account stated. The separate causes of action are not mentioned and not relied upon. The allegation as to *bona fides*, therefore, must be confined to the account stated. That transaction dealt with the payment of money only, and in that transaction no cotton was to have been delivered or received. Even if the defendant had gone further than merely giving his consent to the result of the stated account and promise to pay it, and had given his most solemn note, bill, bond, judgment, mortgage or other security in whole or in part for the balance of the account, the security so given would have been utterly void, frustrate and of noneffect to all intents and purposes whatsoever. Civil Code, 1912, section 3425.

REP.]

April Term, 1914.

Even if the third cause of action could borrow allegations from the first and second causes of action, we have seen they cannot stand because each of them is based in part on illegal transactions.

It seems to me that this complaint not only states no cause of action, but states contracts that the statutes have expressly declared illegal.

The purchases and sales are said to have been made subject to the rules of the New York Exchange. What are those rules? It may be that no reference to the rules need be made, but the reference *is* made, and if the rules required the delivery and receipt in every contract, it would have been a useful allegation. The complaint does allege that exhibit II was made in accordance with those rules, and exhibit II shows that the failure to deliver and receive was unworthy of mention. Exhibit II shows that the differences, in money only, constituted the breach of the contract. Exhibit II does not show that receipt and delivery in kind could not be had, but that is not the question. If the rules are pertinent at all, they must require receipt and delivery in kind, and exhibit II (if in accordance with the rules as alleged) shows that differences only were required. The statutes require a *bona fide* intention to deliver and receive in kind. The defendant was both buyer and seller in each series. The statute requires that both buyer and seller in each contract shall intend to deliver and receive in kind. It may be said that the allegation of a *bona fide* intention does not apply to all the transaction, but it does apply to those in which the defendant lost out. If the defendant wants to disregard those items in which he won, the Court is at liberty to do so. The statute does not permit the Courts to separate the good from the bad, but declares that if the illegal feature enters at all, the whole shall be *utterly void*,

frustrate and of noneffect to all intents and purposes whatsoever.

For these reasons I dissent.

MR. JUSTICE GAGE did not sit in this case.

8872

FIRST NATIONAL BANK v. CAROLINA MIDLAND WAREHOUSE CO. *ET AL.*

(82 S. E. 405.)

REVIVAL OF JUDGMENTS.

A judgment obtained and entered in 1895 cannot be revived by service of summons to renew execution after the expiration of ten years from that date.

Before GAGE, J., Barnwell, November, 1913. Affirmed.

Proceeding under summons to renew execution on judgment recovered in 1895, issued and served in October, 1913. From order refusing motion, J. R. Pringle and T. Moultrie Mordecai, receivers of the Royal Fertilizer Company, claiming the judgment under an assignment from the plaintiff, First National Bank of Charleston, made on 23 June, 1911. Appeal.

Mr. Thos. M. Boulware, for appellant, cites: 13 S. C. 120 and 59 S. C. 70.

Mr. James M. Patterson, for respondents, cites: 81 S. C. 89; 45 S. C. 11; 19 S. C. 498; Code Civil Proc., secs. 347 to 349.

July 15, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

REP.]

April Term, 1914.

This was a summons to renew an execution, and was heard by his Honor, Judge Gage, at the Fall term of the Court, in 1913, for Barnwell county. The summons (issued October 1, 1913) recited that the judgment was obtained and entered upon the docket, and execution issued thereon April 10, 1895, from the Court, but that the active energy had expired, and defendants were summoned to show cause why the same should not be renewed at the next term of Court. The defendants answered, and alleged that more than ten years had elapsed since the rendition and entry of the judgment, and that the lien thereof, if any, had been lost. His Honor refused the motion without prejudice to the plaintiff to prosecute his remedy in any other way he sees fit except that determined in this proceeding. The plaintiff appeals and, by three exceptions, alleges error on the part of his Honor. At the hearing exceptions two and three were abandoned. The first exception is as follows: "1. Because his Honor erred in sustaining and holding sufficient the return made by the defendant, C. M. Edenfield, to the summons to renew execution on said judgment, in that, this being, not a summons to revive said judgment, but a summons to renew execution, which is the equivalent of a motion for leave to issue execution. His Honor erred in applying the law governing the revival of judgments, and in not holding, that the plaintiff could apply to the Circuit Court for leave to issue execution on its judgment after ten years from its date and within twenty years therefrom."

This exception is overruled. Sections 347-349 of Code Civ. Proc. 1912, provides how an execution can be revived and that it must be within ten years after rendition of judgment. *Blohme v. Schmancke*, 81 S. C. 89, 61 S. E. 1060, and cases therein cited.

Judgment affirmed.

MR. JUSTICE GAGE was disqualified, and did not sit in this case.

8873

LOTT v. SOUTHERN RAILWAY CO.

(82 S. E. 795.)

APPEAL AND ERROR. ORDERS APPEALABLE. NEW TRIALS.

An order of the Circuit Court granting a new trial, in a case removed into that Court by appeal from a magistrate's Court, is not appealable, where the amount of damages has not been determined and the Supreme Court could not render judgment absolute if it should determine that no error was committed in granting the new trial. (See *Eaker v. Floyd*, 97 S. C. 881, 81 S. E. 656.)

Before GAGE, J., Barnwell, November, 1913. Appeal dismissed.

Action by Mrs. Quilla Lott against Southern Railway Company. From order of Circuit Court granting a new trial, the defendant appeals. The facts are stated in opinion.

Mr. J. Henry Johnson, for appellant, submits: *Circuit Judge should have given judgment absolute for defendant*: Code Civil Proc., sec. 407; *Ib.*, sec. 304.

Mr. A. H. Ninestein, for respondent.

July 15, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

This action was brought before a magistrate for ten dollars damages to a suit case, and fifty dollars, penalty under the statute for nonpayment. The magistrate gave judgment for the amount of the claim and the penalty. Upon appeal, the case was heard by Judge Gage. He was not satisfied with the proof as to the damages and granted a new trial. From this order this appeal is taken.

REF.]

April Term, 1914.

The amount of actual damages has not been determined. This Court can not give judgment absolute and the order is not appealable.

Appeal dismissed.

MR. JUSTICE GAGE did not sit in this case.

§874

EASTERLING v. ODOM.

(82 S. E. 407.)

CLAIM AND DELIVERY. PROCESS. APPEAL AND ERROR.

1. Service of summons may be made by any person not a party to the action.
2. An interlocutory administrative order directing a sheriff of one county to seize and take cattle in another county, under the provisions of the Code of Civil Procedure (sec. 259), does not involve the merits, and is not appealable.
3. Where the venue of an action for claim and delivery of certain cattle laid in C. was changed to M. for convenience of witnesses, error in directing the sheriff of M. to seize the cattle in C. for immediate delivery to plaintiff did not present an issue "involving the merits," and was therefore not a matter on which to base an appeal authorized by Code Civ. Proc. 1912, sec. 11, par. 1.

Before FRANK B. GARY, J., Bennettsville, November, 1913. Appeal dismissed.

Action by H. T. and A. G. Easterling, copartners, etc., against C. D. Odom. The order appealed from was as follows:

"This case comes before me on a motion made by plaintiffs, for the removal of the cause from Chesterfield county, where the action was instituted, to Marlboro county, where all of the parties reside, and for the purpose of obtaining such order of this Court as will permit the sheriff of Marlboro county to seize the cattle described in the complaint.

It seems that the above entitled action is one for the claim and delivery of certain cattle claimed by the plaintiffs now in the possession of the defendant, in his pasture, which is just across the Pee Dee River in Chesterfield county.

It further appears that the defendant herein, through his counsel, has expressed a willingness to have the case transferred from Chesterfield county to Marlboro county, and the question I am called upon to decide, is whether the cause, having been transferred by consent to Marlboro county, the sheriff of the last named county should not be permitted and required to seize the cattle claimed as fully and effectually as if the said cattle were in Marlboro county. It appearing to my satisfaction that the claim and delivery papers in this action were issued at the same time as the summons in this action, that all of said papers, including the summons and complaint, claim and delivery papers, and bond were all served on the defendant on the 18th day of November, 1913, by J. H. David, and it further appearing to my satisfaction that it will be much more convenient and agreeable for the sheriff of Marlboro county to seize the said personal property instead of the sheriff of Chesterfield county:

Now, on motion of D. D. McColl, Jr., attorney for the plaintiffs, it is ordered, that this case be, and the same is hereby, removed from Chesterfield county to Marlboro county by the consent of the defendant.

It is further ordered, that all further proceedings in this case be had in Marlboro county, just as fully and effectually as if the action had been originally instituted in the last named county.

It is further ordered, that the sheriff of Marlboro county shall forthwith seize the property described in the complaint, and deliver the same to the plaintiffs in this action, unless the defendant shall take the necessary legal steps to replevy said property. The charges and intentions of this order being that the sheriff of Marlboro shall seize said property without

REF.]

April Term, 1914.

any prejudice to the rights of the defendant to replevy the same according to law."

The defendant appeals on the following grounds, to wit:

1. That his Honor erred in granting the order of said date on the ground that the sheriff of one county has no jurisdiction beyond his county limits.

2. That his Honor erred in holding that the bond in question has been properly served.

3. That his Honor erred in holding that there had been a sufficient claim of the property in question under the statute.

4. That his Honor should have held that it was without jurisdiction to grant the order in question.

5. That his Honor should have held that there had not been a sufficient service of the bond in question.

6. That his Honor should have held that there had not been a sufficient claim of the property in question and that inasmuch as the summons had been issued and answer served, the action was one to try title to personal property.

Mr. S. S. Tison, for appellant, submits: *The order involved a question of jurisdiction, and is appealable:* 43 S. C. 149. *Sheriff had no jurisdiction beyond his county limits:* 2 Rich. 568; 8 Am. St. Rep. 457; Code Civil Proc. 259. *No waiver by consent to change of venue:* 57 S. C. 14; 87 S. C. 101. *Character of action:* Code Civil Proc. 177, 257, 260; 29 S. C. 31.

Mr. D. D. McColl, Jr., for respondent.

July 15, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

The action is manifestly for claim and delivery of five head of cattle; the venue was laid in Chesterfield, wherein

the cattle had been put to pasture on defendant's land. All the parties then and now resided in Marlboro.

Concurrently with the issuance of summons and complaint, the plaintiffs demanded the "immediate delivery" of the cattle (Code of Civil Procedure, sec. 257); but the sheriff of Chesterfield had not executed that remedy, nor had he served the summons and complaint; both were served in Marlboro by "another person not a party to the action." (Code Civil Procedure, sec. 183.)

The plaintiffs then moved the Circuit Court to change the venue to Marlboro for the convenience of witnesses (Code Civil Procedure, sec. 176), and, also, for direction to the sheriff of Marlboro to seize the cattle in Chesterfield for "immediate delivery." The motion was granted.

The defendant consented to a change of venue, but dissented from all service of process by another than the sheriff of Chesterfield and from direction for seizure by sheriff of Marlboro.

So practically the appeal makes only two issues, though there are six exceptions. The first is, ought there to have been exclusive service of process by the sheriff of Chesterfield; the second is, did the Circuit Court have power to direct the sheriff of Marlboro to go into the pasture of Chesterfield, take the cattle and carry them into Marlboro.

On the first issue the provisions of the Code are conclusive against the appellant. Section 183 provides for service by the "sheriff of the county where the defendant may be found, or by any other person not a party to the action."

The defendant was not "found" in Chesterfield; he was in Marlboro and was there served by David, who was not a party to the action.

The second issue presents nothing "involving the merits," and is, therefore, not a matter to be appealed.

Code of Civil Procedure, sec. 11, par. 1.

The plaintiff had a *right* to immediate delivery, and the defendant had a right to a redelivery. How these rights

REP.]

April Term, 1914.

are to be ordinarily enforced, is set out in the Code of Procedure, but that they have not been so enforced is not material on appeal, when the title of the parties in the property is not imperiled.

The judgment of this Court is, that the appeal be dismissed, and it is so ordered.

8875

MITCHUM v. SHAW ET AL.

(82 S. E. 401.)

ACTIONS TO RECOVER REAL PROPERTY. LIMITATIONS OF ACTIONS.

1. An action by one of several alleged tenants in common against a third party in possession of lands claiming adversely to them, and the other alleged cotenants with plaintiff, to eject said third party, and partition the land among the cotenants, is an action against said third party for recovery of possession of land.
2. Where plaintiff, or those under whom he claims, have had two actions against a person in possession of lands claiming adversely to him or them, any further action by plaintiff to recover possession of such lands is barred.

Before SPAIN, J., Bamberg, March, 1913. Reversed.

Action by Henry Mitchum against Emma R. Shaw, Minerva Kinard, Henry Chassereau, Willie Chassereau, G. B. Clayton and J. F. Connelly. From decree for plaintiffs, Clayton and Connelly appeal.

Messrs. Carter & Carter, for appellants, cite: 17 Stats. at Large 76; 28 S. C. 532; 81 S. E. 307 and 49 S. C. 1.

Messrs. Mayfield & Free, for respondent, cite: 49 S. C. 4; 81 S. E. 301; 37 S. C. 77; Code Civil Proc. 123.

July 15, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

This action involves the right to fifty acres of land.

It professes to be an action for partition; the Circuit Court so held, and ordered partition.

The real defendant, G. B. Clayton, has appealed, and stated nine exceptions, but there are but two issues, and they of law.

Confessedly, the land formerly belonged to Isaac Chasse-reau; he conveyed it by deed to his wife, Mary, by a peculiar instrument, which the Circuit Court has construed; but which deed is not relevant to the issues upon which the cause must be decided.

Mary conveyed the land by way of mortgage to the Bank of Hampton.

That mortgage was foreclosed, and Clayton became the purchaser, at second hand, from the bank, and has been in possession of the land since 1904, claiming it as his own. Connelly is his tenant.

Mary died at an unascertained day, before 1905. Isaac died at an unascertained day.

The two left six children, to wit: Emma R. Shaw, Sarah R. Rentz, M. Cornelia Mitchum, M. E. Chassereau, D. W. Chassereau, and W. J. Chassereau.

The last named died and left six children, to wit; Minerva Kinard and Henry, Willie, Wyman, Jere and George Chassereau (4th paragraph complaint).

Before the commencement of this action in 1911, there were two actions to recover this same land, one in 1905 and one in 1906. The parties thereto will be referred to hereinafter.

These actions were confessedly for the recovery of real property. If this action is of the same character, and by the same parties or their representatives, then it is barred by the statute, sec. 123, Code of Civil Procedure.

REP.]

April Term, 1914.

The plaintiff, however, stoutly contends that this is not an action for the recovery of real property, but an action for the partition of real property; and for authority he cites: *Elmore v. Davis*, 49 S. C. 1, 26 S. E. 898, and *Foster v. Foster*, 81 S. C. 301, 62 S. E. 320.

It is true, the Court said in the former case, that the character of the action is determinable by the complaint, and not by the answer, which may raise the question of title.

If that be so, the complaint in the case at bar is conclusive that this is not an action for partition so far as Clayton is concerned.

The 5th paragraph alleges that the *whole title* is in other parties to the action than Clayton. If that be so,

1 Clayton is wrongfully in possession (the complaint alleges he is in possession), and the only remedy to be had against him is to eject him.

But on that issue the Constitution gives him the right to a trial by jury. He has no interest in a partition betwixt the owners of the whole title.

It would be a feigned procedure, and in total denial of the right of trial by jury, to allow three persons to litigate between themselves the division of a title, and in doing that to put out of possession a fourth party on the land and claiming it as his own. Yet that is this case. *Reams v. Spann*, 28 S. C. 530, 6 S. E. 325.

Thereupon the second issue arises, and it is this:

2 has the plaintiff heretofore had two actions to recover this land?

In 1905 all the children of Isaac and Mary, except M. Elmo Chassereau, sued the defendant, Clayton, for the recovery of the land. That action was discontinued. In the same year, Henry Mitchum, the present sole plaintiff, secured, to be made to himself, a deed of their interests, from all the heirs of Isaac and Mary, except Emma Shaw, who held one-sixth, and three children of John, who together held one-twelfth.

In the next year, 1906, Henry Mitchum, Emma Shaw and one of the children of John, sued the defendant Clayton, and the Bank of Hampton for the recovery of the land. That action was discontinued.

In 1911 the action now at bar was brought by Henry Mitchum, sole plaintiff.

The two actions first named were confessedly to recover possession of the same land; they were against the same defendant; they set up the same offensive title, and Henry Mitchum or his assignors was the plaintiff.

By the law of the land, the defendant, Clayton, may not now for the third time be haled into Court by these plaintiffs; they are limited to two actions and no more.

The judgment of the Circuit Court is reversed and the complaint is dismissed.

8876

ROGERS v. FELDER.

(82 S. E. 486.)

SALES. CLAIM AND DELIVERY. TITLE IN THIRD PARTY.

1. The delivery of property by one in satisfaction of a debt due by another is a valid sale, and not a promise to pay the debt of another, within the inhibition of the statute of frauds.
2. A defendant in claim and delivery from whom the plaintiff derived title, cannot show outstanding title in a third party, under a senior mortgage executed by her, to defeat the action.

Before FRANK B. GARY, J., Manning, February, 1914.
Affirmed.

Action in claim and delivery by D. M. Rogers against Julia Ann Felder. From judgment for plaintiff, defendant appeals on the following exceptions:

REP.]

April Term, 1914.

I. The Circuit Judge erred as a matter of law in not delivering the property in dispute to C. M. Davis & Son by virtue of the affidavit of said C. M. Davis & Son.

II. The Circuit Judge erred as a matter of law in not holding that the chattel mortgage of C. M. Davis & Son, which was offered in evidence, defeated the claim of the plaintiff.

III. The Circuit Judge erred as a matter of law, that if the facts existed as alleged by plaintiff, the delivery of the property in dispute to the plaintiff was for the payment of a debt for another, and said contract not being in writing, was null and void as against the subsequent creditors, C. M. Davis & Son.

IV. The actual possession of the property in dispute being out of the plaintiff at the time the defendant mortgaged same to C. M. Davis & Son, who are *bona fide* subsequent creditors, the complaint of the plaintiff should have been dismissed and judgment rendered for defendant.

Mr. J. J. Cantey, for appellant, cites: (1) Code Civil Proc., secs. 86, 267; (2) Civil Code, sec. 3739; (3) 78 S. C. 295; (4) 25 Am. & Eng. Ann. Cases 21.

Messrs. Purdy & O'Bryan, for respondent, submit: *All the exceptions set up alleged rights of third parties not before the Court.*

July 15, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

Action in a magistrate's Court for the recovery of the possession of two cows. Judgment by magistrate for plaintiff. Affirmed by Circuit Court.

Appeal here upon four assignments of error.

The plaintiff's contention in the trial Court was: that defendant's father owed plaintiff a debt, and defendant delivered to plaintiff the cows in satisfaction thereof.

If that be so, and the Court so found, then it was not a *promise* by defendant to pay the debt of another; and the case does not fall within the inhibition of the statute of frauds. Thus the third exception is not well taken.

The other three exceptions relate to the force and effect of a mortgage on the cows which defendant had aforesaid executed to C. M. Davis & Son. At most the execution of such a mortgage was but an assertion of title by Julia Ann.

There is no question but that she did have title, for the plaintiff's contention is she delivered the cows to him in satisfaction of a debt due to him by another.

C. M. Davis & Son did not assert title under their mortgage; they did not come in as parties to the cause; they did not pursue the remedy prescribed at section 86 of the Code of Civil Procedure, and they do not appeal from the judgment of the Circuit Court.

The judgment of the Circuit Court is affirmed.

8877

BARNETT v. GOTTLIEB.

(82 S. E. 406.)

PRACTICE. TRIAL. ORDER OF ARGUMENT. EXAMINATION OF WITNESSES.
OPINION EVIDENCE.

1. The right of plaintiff to open and close arguments to jury should not be denied, unless waived.
2. The Court may waive the rule as to number of counsel participating in conduct of examination of witness.
3. The opinion of a magistrate as to whether or not a person committing an assault has been sufficiently punished for the criminal offense is incompetent on the trial of civil action to recover damages for the assault.

FOOTNOTE.—As to the discretion of the Court in enforcing its rules; see *Meek v. Richardson*, 25 S. C. Eq. (4 Rich. Eq.) 88; *Mitchell v. Anderson*, 19 S. C. L. (1 Hill 8) 69; *Ex parte Clyde*, 14 S. C. 385.

REP.]

April Term, 1914.

Before RICE, J., Marion, April, 1913. Reversed.

Action by Nathan Barnett against Samuel L. Gottlieb to recover damages for an assault. From judgment for defendant, plaintiff appeals.

Mr. Nathan Barnett, plaintiff-appellant, appearing in person.

Mr. Hoyt McMillan, for defendant-respondent: *Cross-examination of plaintiff in discretion of Judge*: 73 S. C. 386; 33 S. C. 39.

July 16, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This was an action for damages for an assault and battery. The defendant was arrested, and held for bail, under section 238 of the Code of Civil Procedure, 1912. He furnished bail, and the cause was tried at the April term of the Court, 1913, before Judge Rice and a jury. The defendant did not appear in person, but was represented by counsel. The sureties on the defendant's bond were also represented by counsel. The jury returned a verdict in favor of the defendant. A motion for new trial was made and refused. Plaintiff appeals, and by five exceptions asks reversal. The third exception imputes error on the part of his Honor in permitting counsel for defendant to reply to the argument of plaintiff to the jury, giving counsel for defendant the opening and closing argument to the

1 jury. Under rule LIX of the Circuit Court, and the pleading in this case, the plaintiff was entitled to open and close the argument in the cause. It is true that the record fails to disclose that the plaintiff claimed his rights, but it was the duty of the Court to enforce the rules, and the burden is on the respondent to show waiver of this privilege on the part of the appellant, and no attempt is made to do this. During the examination of witnesses the

Court permitted both Mr. Johnson, who represented the sureties on the defendant's bond, and Mr. McMillan, who represented the defendant, to examine the witnesses, and the plaintiff protested, and we find the following: Mr. Barnett (addressing the Court): "May it please your Honor, I want the protection of the Court and only one lawyer to be examining me." The Court: "Mr. Barnett, the Court allows more than one lawyer. This thing is getting tiresome to me." Mr. Barnett: "It is getting tiresome to me, too."

It was clearly within the right of the Judge to dispense with the requirements of rule XXXI of Circuit Court, which provides that only one counsel on each side shall examine or cross-examine a witness, and not more

2 than one counsel on each side shall sum up or be heard in any cause; but it was his duty to enforce the rule as to the plaintiff's right to open and close. When his Honor told the plaintiff his objections were getting tiresome to the Court, it was calculated to deter the plaintiff from further renewing his objections along this line, and while his Honor had the right to exercise a discretion in reference to rule XXXI of the Circuit Court, he had no right to suspend or change rule LIX of the Circuit

3 Court, and the exception must be sustained. Exception one complains of error in permitting evidence over objection, among other things the following, from the witness, Ganis, who was the mayor at Nichols: "How much can you fine a man?" Answer: "\$100." "How much did you fine him?" Answer: "\$5." "Did you consider \$5 a sufficient fine as punishment for his offense?" Answer: "I thought that was a plenty when the man came up like he did and not being arrested." This was clearly incompetent and highly prejudicial to the plaintiff, it permitted the witness to give his opinion to the jury that the defendant had been sufficiently punished, and that the plaintiff had not been damaged by the alleged indignity of being

REF.]

April Term, 1914.

assaulted and beaten. The witness did not lay the foundation to give an opinion, as required in *Seibles v. Blackwell*, 1 McM. 51; *Jones v. Fuller*, 19 S. C. 70; *Chemical Co. v. Kirven*, 57 S. C. 488, 35 S. E. 745. The admission of this testimony was clearly erroneous and prejudicial, and the exception must be sustained. It is unnecessary to consider the other exceptions.

The judgment is reversed and new trial granted.

8878

BECKWITH v. MARTIN.

(82 S. E. 414.)

JUDGES. PRACTICE. JURISDICTION.

1. A Judge in another Circuit than that in which a cause is pending, has no jurisdiction to make an order in such cause, without evidence to show that there is no Judge in the Circuit where cause is pending.
2. An order should not be made, after default has occurred, extending time within which to answer, without notice to plaintiff.
3. A judgment cannot be vacated or set aside at chambers.
4. An order of one Circuit Judge cannot be reviewed, modified or changed by another Circuit Judge.

Before SPAIN, J., at chambers in Lexington, February, 1914. Reversed.

Action pending in the Court of Common Pleas for Abbeville county by Pearl M. Beckwith against W. B. Martin. Plaintiff appeals from an order extending time within which to answer. The facts are stated in the opinion of the Court.

Mr. Wm. N. Graydon, for appellant, cites: 6 S. C. 472; Code Civil Proc. 225; 47 S. C. 31; 77 S. C. 85.

July 16, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This is an appeal from an order of his Honor, Judge Spain, and involves the right of a Circuit Judge, at chambers, and in another Circuit than the one in which action is pending, without notice to the adverse party or his attorney, to grant an extension of time to answer the complaint, long after the time has expired, and to set aside orders made by the Court in the cause. The action between the parties was for specific performance of a contract. The defendant gave notice of a motion to transfer the case to another county for trial. This motion was refused and notice of appeal was duly given, but the appeal was never perfected and was dismissed by the clerk of the Supreme Court under rules 1 and 2. The action was commenced in March, 1913, and no answer served. In February, 1914, nearly a year after commencement of the action, Judge Spain, then presiding in Lexington county, without notice to the plaintiff or her attorney, passed an order extending the time to answer until the 20th of February, 1914, and from this order this appeal is taken. The appeal must be sus-

1 tained and judgment reversed. His Honor was
 in error in granting the order. Under the showing made before him he was without jurisdiction to hear the motion. He was out of the Circuit in which the cause was pending; there was not a sufficient showing before him, there was no resident or presiding Judge in the Circuit where action was pending. He

2, 3 should not have made an order to the prejudice of
 the plaintiff without notice. A Circuit Judge is not empowered at chambers to set aside a judgment. That is for the Court. *Turner v. Foreman*, 47 S. C. 31, 24 S. E. 989; *Sarratt v. Mfg. Co.*, 77 S. C. 85, 57 S. E. 616. His

Rep.]

April Term, 1914.

Honor was in error in attempting at chambers to in
4 any manner interfere with the orders passed in the
cause by the presiding Judge. He was without
power or authority to so do. *Middleton v. Denmark Ice and
Fuel Co.*, and cases therein cited; 97 S. C. 457, 81 S. E. 158.
Judgment reversed.

8879

CANNON v. COX.

(82 S. E. 399.)

LANDLORD AND TENANT. EXCESSIVE DISTRESS DAMAGES. RES JUDICATA.

1. There being testimony of plaintiff tending to show a reckless disregard of his rights by defendant in levying a distress warrant upon his household goods the cause of action for punitive damages, because of an unreasonable and excessive distress, was properly submitted to the jury.
2. A landlord taking possession of his tenant's property under a claim of distress for rent, and requiring the tenant to resort to claim and delivery to recover the property, is estopped from asserting that the distress was void or illegal.
3. A charge that the jury might infer wilfulness and wantonness from gross negligence not error where the jury were instructed that there is no wilfulness in the case and there can be no punitive damages unless the landlord had been so grossly negligent in keeping his accounts with the tenant that the law would impute wilfulness on account of such gross negligence in claiming an excessive amount due him as rent.
4. If a landlord was reckless in ascertaining the amount of rent due, and distrained for a larger sum than was due; such facts were admissible as tending to sustain claim for punitive damages.
5. The defense of *res judicata* comes too late, when not plead, and when presented to the Court for the first time on motion for a new trial.
6. A judgment on a different cause of action is not *res judicata* in a subsequent action where the issues involved in the second action were not necessarily involved, and were not actually litigated, in the first action.

Before RICE, J., Florence, April, 1913. Affirmed.

Action by Francis Cannon against G. O. Cox. From judgment for plaintiff, defendant appeals. The facts are stated in the opinion.

Messrs. Willcox & Willcox, Henry E. Davis and S. M. Wetmore, for appellant: There was no actual levy of distress, as the goods were not removed before plaintiff replevied them in claim and delivery proceedings: 3 McC. 38; 81 S. C. 220; 19 S. C. 200. Gross negligence will not support punitive damages: 60 S. C. 73; 65 S. C. 44. Claim and delivery proceedings bar this action: 42 S. C. 386-7; 42 S. C. 205; 72 S. C. 33; 81 S. C. 519; 57 S. C. 14; 71 S. C. 456, distinguished because prior to act of 1909.

Messrs. Gasque & Page, for respondent, cite: Excessive distress: 24 Cyc. 1327, sec. 5. Reckless disregard of plaintiff's rights: 88 S. C. 7; 82 S. C. 456; Civil Code, sec. 3520. Charge as to excessive distress: 88 S. C. 368. Joinder of claims for damages, under sec. 321, Code Civil Proc., is permissive, not mandatory: 71 S. C. 420; 82 S. C. 456. Res judicata: 81 S. C. 516; 26 S. C. 173; 77 S. C. 494; 94 U. S. 195; Pom. Rem., sec. 804. Defendant estopped to question legality of his distress proceedings: 24 Cyc. 1314, 1324; 1293, sec. 8; 1294, sec. 10; 3 Hill 276; 7 Rich. 37. Punitive damages: 62 S. C. 380; 24 Cyc. 1328; 88 S. C. 368.

July 16, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This is an action under section 3520, volume I, Code of Laws, 1912, to recover actual and punitive damages on account of an alleged unreasonable and excessive distress for rent made by the defendant on the goods of the plaintiff.

The jury rendered a verdict in favor of the plaintiff for \$250.00, and the defendant appealed.

The first exception is as follows:

Rzf.]

April Term, 1914.

"His Honor erred, it is respectfully submitted, in refusing to grant defendant's motion for a nonsuit, on the
1 cause of action based on wilfulness, made at the close of plaintiff's case, for the reasons stated in the ground for such motion, which was as follows:

"There is absolutely no proof of any wilful or wanton conduct on the part of the defendant.'"

The amount, for which the defendant distrained, was \$17.00; and the description of the property distrained is as follows: One oak bedstead, one spring and mattress, one single bedstead, with mattress and spring, one bureau, one washstand, one trunk, one table, two rockers, four chairs, one lamp, one stove and utensils, and one wardrobe or side-board.

The plaintiff thus testified as to the value of said property:

"Q. What were the goods worth, the actual worth, not what they were worth to you, but what were they worth? A. They were worth, at least estimation, \$300.00. Q. Were they worth \$100.00? A. Yes, sir. Q. It says one oak bedstead; what kind of a bedstead was that? A. Heavy rolled footbed, high head. Q. One spring and mattress, that belonged to that bed? A. Yes, sir. Q. One bureau; what kind of a bureau was that? A. I guess about 32 by 33 inches. Q. It belonged to the same set? A. Yes, sir. Q. One washstand? A. I guess 22 by 30 inches. Q. Belonged to the same set? A. Yes, sir. Q. Single bed, mattress and spring; what kind was that? A. Plain bed. Q. Oak bed? A. Yes, sir. Q. One trunk; what kind of a trunk was it? A. Ordinary trunk. Q. One table; what kind of a table was it? A. Round table. Q. Oak table? A. Yes, sir. Q. Two rockers? A. Oak. Q. Two oak rockers? A. Yes, sir. Q. What were they worth—actually worth? A. \$3.00 each. Q. Four straight chairs? A. Oak chairs. Q. Split seat or cane seat? A. Cane seat. Q. One lamp; what was that lamp worth? A. \$1.00. Q.

One safe and utensils? A. \$15.00. Q. One wardrobe or sideboard? A. Sideboard. Q. What was it worth? A. \$12.00."

The plaintiff also testified as follows in regard to the amount of the rent that was due when the distress was made:

"Q. Now, Cannon, at the time this distress warrant was issued; the records show that the distress was for \$17.00; did you or not owe him \$17.00 at that time? A. I did not. Q. What did you owe him? A. \$6.15. Q. Did you or not offer to pay the defendant any amount you might owe him if he would go with you to your attorney and check up your receipts? A. Yes, sir; I would settle according to his accounts, and otherwise I wouldn't, because he could beat me in figuring, and I wouldn't trust a receipt in his hand."

After the property was distrained the plaintiff brought an action in claim and delivery, and the defendant thus testified as to what took place upon the trial of that case:

"Q. At that time he produced certain receipts which you didn't have a record of, and those were credited on the account? A. Yes, sir. Q. State whether or not that reduced the amount to \$6.15? A. Yes, sir."

There was testimony contradicting the plaintiff, both as to the value of the property and as to what took place between him and the defendant in regard to the amount due.

If the jury believed the testimony of the plaintiff it was sufficient to show a reckless disregard of his rights by the defendant.

This exception is overruled.

Second Exception:

"His Honor erred, it is respectfully submitted, in refusing to direct a verdict in favor of the defendant upon the grounds stated in support of said motion, which were as follows:

'There is no proof of wanton or wilful conduct on the part of the defendant.'

REP.]

April Term, 1914.

"There never was any distress for rent, upon which to base the cause of action, and there cannot be any cause of action based on an illegal distress.' "

The first ground has already been disposed of, and we proceed to the consideration of the second.

One of the allegations of the plaintiff's complaint, in the action for claim and delivery hereinbefore mentioned was, that the defendant had distrained for more rent than was due him. After taking possession of the property
2 under a distress warrant and requiring the plaintiff to resort to an action in claim and delivery to recover possession of his property the defendant is estopped from interposing the objection that his action was illegal.

If the levy was unreasonable and excessive the defendant was a trespasser *ab initio*. *Lander v. Ware*, 1 Strob. 15.

This exception is overruled.

Third Exception:

"His Honor erred, it is respectfully submitted, in giving the jury this charge:

'If a man sets up a claim for a good deal more rent than he knows is owing him, and levies a distress warrant for this rent, he is liable not only for actual damages, but for punitive damages also, because he knows he is doing wrong. But if a man is honest in his belief that the tenant owes him this money, and unless he has been grossly negligent, in keeping his accounts with the tenant, so much so that the law would impute wilfulness, on account of that gross negligence, then if he claims more than is due him, there is no wilfulness in the case, and there can be no punitive damages. It is for the jury to say, whether or not in any particular case, where a man makes a claim for more than is due him, and makes a distress for more than is due him, whether he ought to have known that he was claiming more than was due him. Or the jury can say whether he was grossly negligent in keeping his account with the tenant, and if he was grossly negligent and claims more than was due him, and

makes a levy on the goods and chattels of his tenant, then, from that gross negligence, wilfulness and wantonness might be inferred.'

The error being: (a) That he thereby charged the jury that they might give punitive damages for gross negligence, and (b) that gross negligence in keeping an account can not be of such a character as to indicate recklessness, and thus afford a basis for punitive damages."

We proceed to the consideration of assignment of error: (a) His Honor did not charge the jury, simply, that they might give punitive damages against the defendant for gross negligence in keeping his accounts with the tenant, but charged that the defendant would not be liable for punitive damages, unless he has been grossly negligent, so much "*so that the law would impute wilfulness on account of that gross negligence.*" As thus explained or qualified, the charge was free from error.

Assignment of Error: (b) It must be remembered, that this is not an action for negligence in keeping an account, but for an unreasonable and excessive distress, in which the amount that was due for rent was an exceedingly
4 important element. If the defendant was reckless in ascertaining the amount that was due, and he distressed for a larger sum than was due, such fact was admissible to sustain the allegation for punitive damages.

This exception is overruled.

There was no exception numbered IV, and the one numbered V was abandoned.

Sixth Exception:

"His Honor erred, it is respectfully submitted, in refusing defendant's motion for a new trial, for the reasons set forth in the grounds for said motion, which were as follows:

'*First:* Because the plaintiff is barred and estopped from maintaining this action, by the judgment rendered in the claim and delivery suit, instituted by him against this defendant in the magistrate's Court in Florence county,

REF.]

April Term, 1914.

which judgment is pleaded in paragraph seven of the complaint, and was introduced in evidence in the trial of this cause, in that the parties to both suits are the same, the subject matter is the same, and the question litigated in the present case was either litigated or could have been litigated in the said suit in the magistrate's Court.

'*Second*: Because the defendant could not be held liable for an unreasonable and excessive distress, when the entire proof showed that there had never been any legal distress of the plaintiff's goods by the bailiff taking them out of the possession of the plaintiff and actually impounding them.

'*Third*: Because the verdict is manifestly for punitive damages, and there was no proof of any wilfulness or wantonness on the part of the defendant upon which such damages could be based.

'*Fourth*: Because there was no proof of an unreasonable and excessive distress.' "

We proceed to consider the first assignment of error.

His Honor, the Circuit Judge, in refusing the motion for a new trial said: "The first ground raises the point of '*res judicata*.' My recollection of the trial is, that this defense

was never raised or brought to the attention of the
5 Court, at any stage of the trial, but is presented here for the first time. It appears to me, therefore, that it comes too late.

"On the trial the plaintiff introduced in evidence the record of an action of claim and delivery, instituted by the above named plaintiff against the defendant for the recovery of the possession of the chattels distressed, and for which distress the above stated action was brought. The defendant now claims that the plaintiff could have presented in the magistrate's Court in that action her demand for damages, and, not having done so, the question of damages for any unreasonable or excessive distress on that occasion is *res judicata*, and cannot again be litigated.

"I think, that upon consideration of the principles announced in *Hart v. Bates*, 17 S. C. 40; *Kirven v. Va. Car Chem. Co.*, 77 S. C. 493; 58 S. E. 424, and *Cromwell v. Sac Co.*, 94 U. S. 351, and their application to the facts in this case, the defense of *res judicata* cannot avail the defendant, even if interposed in time."

The reasons stated by his Honor, the Circuit Judge, are satisfactory to this Court.

There is only one authority which should be added, to wit: *Kirven v. Car. Chem. Co.*, 215 U. S. 252; 30 Sup. Ct. Rep. 78; 54 L. Ed. 179.

The second assignment of error can not be sustained, for the reasons stated in considering the second exception.

What has already been said disposes of the third and fourth assignments of error.

Judgment affirmed.

8080

GREER v. KEATON.

(82 S. E. 424.)

APPEAL AND ERROR. PRACTICE. COSTS.

A Judge cannot require respondent in a law case to pay costs of printing case on appeal, and his order vacating such direction affects no substantial right of the appellant, and is not reviewable on appeal. An order settling case is reviewable on appeal.

Before BOWMAN, J., Anderson, June, 1913. Appeal dismissed.

Action by Harrison Greer, *alias* Hack Greer, against W. N. Keaton. The first order settling case on appeal was as follows:

"The 'Case' and exceptions in this case with the amendments thereto submitted by defendant's attorneys, was sub-

REP.]

April Term, 1914.

mitted to me for the purpose of settling the case for appeal, as the appellant declined to accept the proposed amendments as necessary to said appeal. I hereby decide that the case for appeal in this action shall be the case with the exceptions submitted by Messrs. Bonham, Watkins and Allen, attorneys for the defendant-respondent, with the following amendments: The original proceedings in the magistrate's Court were brought by George Orr, Esq., of Greenville, S. C., and later Messrs. Geiger and Wolfe substituted for him. It should be stated in the case that the original proceedings were brought by George Orr, plaintiff's attorney, and that subsequently Messrs. Geiger and Wolfe were substituted as plaintiff's attorneys in the place and stead of George Orr, Esq.

"On page 3, there should be a full stop after the word 'reversal' and after the word 'venue' the following words should be added: 'was had upon motion of the defendant.'

"I further decide that the printing of the testimony should be paid for by the defendant. I so decide, as I think the printing of the testimony would not be necessary for appellant's case, but it will be necessary for respondent's case."

Thereafter, to wit, on 12th September, 1913, Judge Bowman, at his chambers at Orangeburg, S. C., made the following order (omitting caption):

"This is a motion by plaintiff-appellant for an order, supplemental to the order heretofore passed by me settling the 'Case' for appeal to the Supreme Court, to require the defendant-respondent to pay for transcribing and printing the testimony, and to require the sum of sixty-eight dollars, the estimated cost thereof, to be deposited by him in advance with the clerk to defray said expense.

"Upon mature consideration I think that the matter of costs and disbursements upon appeal is fully covered by statute and should be taxed against the losing party on said appeal, and that I have no authority to provide who is to pay the same. It follows, therefore, that so much of my former

order as provides that the respondents shall pay the costs must be vacated, and that the motion must be refused, and it is so ordered.

"It is further ordered that such time as may be necessary for perfecting said appeal and having the same printed and docketed be given, not to exceed thirty days from the date of this order."

From the order of September 12, 1913, the plaintiff appeals. The facts are stated in the opinion of the Court.

Messrs. Geiger & Wolfe, for appellant, submit: *The action is equitable, and costs in discretion of the Court*: 27 S. C. 15. *Unnecessary expense to incorporate irrelevant matter in case*: 97 S. C. 226. *Modification was without notice to plaintiff*: 7 S. C. 235.

Messrs. Bonham, Watkins & Allen, for respondent, submit: *That order is not appealable*: 8 S. C. 50, 61, 62; 85 S. C. 262; 45 S. C. 4; 11 S. C. 122, 134, 135. *Costs should await decision of Supreme Court*: 6 S. C. 290, 291; 28 S. C. 181, 186; 81 S. C. 313, 316; 73 S. C. 18, 20. *What is a substantial right*: 53 N. Y. 322, 329. *Costs on appeal abide result of appeal*: Civil Code 1912, sec. 4204; Code Civil Proc. 1912, sec. 361; 25 S. C. 243, 246; 45 S. C. 4, 7; 93 S. C. 316, 317; 47 S. C. 150, 164; 81 S. C. 313; 66 S. C. 385. *Contents of case*: 56 S. C. 304, 312; 58 S. C. 469, 474; 42 S. C. 183, 184, 369, 380; 53 S. C. 295; 51 S. C. 503; 57 S. C. 44. *Judge must settle case*: Code Civil Proc. 384; Rule V, Supreme Court; 62 S. C. 293, 294; 20 S. C. 190, 195. *Not prejudicial to vacate an order made beyond jurisdiction*: 92 S. C. 172.

July 16, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

REF.]

April Term, 1914.

The cause was tried before Judge Bowman and a jury at the June term of the Court for Anderson county, 1913, and was one for an accounting between landlord and tenant. At the conclusion of the testimony defendant's counsel moved the Court to direct a verdict in favor of the defendant on two grounds: (1st) That there was no testimony to support a verdict for the plaintiff, and (2d) that the records showed the pendency of another action. The Court refused the motion on the first ground, but directed a verdict upon the second ground. From this order the plaintiff gave due notice of intention to appeal, and served defendant's counsel with proposed case with exceptions. Defendant's counsel declined to agree to the case as proposed for appeal, but proposed an amended case incorporating a transcript of the entire testimony. When they appeared before the trial Judge to settle the case, he adopted and settled the case for appeal as amended, but ordered that inasmuch as the testimony was not necessary to the plaintiff's case, but was necessary to the defendant's case, that the defendant pay the cost of printing the same. After this plaintiff's counsel served notice of a motion to have the trial Judge require the defendant to deposit such costs as were necessary to defray costs of making and printing the testimony in accordance with the order of the Judge with the clerk of Circuit Court. On September 12, 1913, the trial Judge passed an order vacating his former order, wherein he had required the defendant to pay in advance the expenses of transcribing and printing the testimony in the case for the purpose of appeal, from this last order plaintiff appealed. Both orders of the Judge should be set out in the report of the case. After due notice given, the respondent moved to dismiss the appeal, on the ground "that the same is not appealable." The sole question raised by appellant's exceptions in this appeal is whether the insertion of the words in the order by the Judge "that so much of my former order as provided that the respondent shall pay the costs be vacated" was

prejudicial to the appellant. The trial Judge had no power or authority to direct in advance who should pay the costs of appeal from the judgment directed by him, and when a motion was made before him to enlarge the order that he had erroneously made by requiring that a fixed amount, to wit, \$68.00, the estimated cost, be deposited with the clerk, it was within his power to vacate that part of his order that he had made without authority or power to so do. He had jurisdiction of the whole matter; he had tried the cause which was appealed from. The attorneys could not agree on the case for appeal, and, under rule V of the Supreme Court, it was his duty to settle the case for appeal and the duty of appellant to prepare the case as fixed by him for appeal, and if dissatisfied with his ruling to have excepted and questioned the correctness thereof when the cause was heard on its merits. This was not such a case in chancery that the Judge had it within his discretion to award costs. It was not an accounting in equity that involved long and complex accounting. There was no complexity in the matter, but an action at law for a specific sum of money alleged to be due to plaintiff by defendant, one being the landlord and the other tenant, tried as a law case before Judge and a jury. It was treated as an action at law with issues triable before a jury by all parties. The Circuit Judge was without jurisdiction to direct in advance who should pay the costs of appeal. His order to that effect in the first instance was a nullity, and he had the right to vacate it when a further application was made to him to enlarge that order and for the purpose of carrying it into effect, the vacation of the order did not affect any substantial right of the appellant and was not appealable. If Circuit Judge required the printing of unnecessary evidence and imposing unnecessary expense, an appeal from this would lie, to be heard with the exceptions when case was heard upon the merits.

Order appealed from affirmed.

REF.]

April Term, 1914.

8881

JONES v. CHARLESTON & W. C. RY. CO.

(82 S. E. 415.)

1. The provisions of the Federal Employers' Liability Act (35 U. S. Stat. at Large 65, chap. 149; U. S. Comp. Stats. Supp. 1911, p. 1182) cover the entire subject of the liability of railroad companies to their employees while engaged in interstate commerce, and supersede the prior State law upon that subject.
2. In an action for the death of an unmarried man whose father and mother were dead, evidence that a brother, who was a farmer, had been and was at the time of the trial sick and unable to work, with no evidence that deceased had ever contributed anything to his support or given him anything or rendered him any service of pecuniary value or that his condition and circumstances were such that deceased would probably have felt impelled by the ties of affection to render him any service or assistance of pecuniary value, did not make a question for the jury as to whether the brother was dependent on deceased within the Federal Employers' Liability Act, April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322).

Before PRINCE, J., Abbeville, March, 1913. Affirmed.

Action by W. P. Jones, as administrator of E. D. Clary, deceased, against Charleston & Western Carolina Railway Company for the wrongful death of intestate. At the close of the testimony the defendant moved the Court to direct a verdict in this case upon the following grounds:

1. The cause of action sued on in this case is based upon the statute laws of the State of South Carolina, whereas the testimony shows that plaintiff's intestate was an interstate employee engaged in interstate commerce on an interstate train, actually engaged in interstate business, at the time of his alleged injury, and therefore he has no cause of

FOOTNOTE.—See note in 47 L. R. A. (N. S.) 88 *et sequa*, on the constitutionality, application and effect of Federal Employers' Liability Act, and supplementary note in 48 L. R. A. (N. S.) 987, 988; and also decision in *Bramlett v. So. Ry. Co.*, *post*. As to who is "dependent" on a workman, within the meaning of the English Workmen's Compensation Act, see *Lee v. Owner of Ship Bessie* (1912), 1 K. B. 88; Ann. Cases 1913, E. 477; and note.

action, except under the federal statute, and there is, therefore, a fatal variance between the cause of action sued on and the cause proved.

2. That the undisputed testimony shows that the plaintiff's intestate, at the time of his injury and death, was in the employ of the defendant on an interstate train running from Augusta, Georgia, to points within the State of South Carolina, and handling interstate commerce, and that he was actually injured and killed by cars loaded with freight moving in interstate commerce in attempting to uncouple the same for the purpose of expediting the interstate journey, and, therefore, he has no cause of action, except under the acts of Congress which are exclusive in this case and, on that account, there can be no recovery under any State statute or law.

3. That under the acts of Congress, applicable in this case, there can be no recovery in this case for the alleged beneficiaries for the reason that no cause of action is given for the benefit of the brothers or sisters, unless they were dependent upon the interstate employee, and, in this case, there is no evidence that they were dependent either wholly or partially.

4. The right of action is given to the personal representative for the benefit of certain designated parties, and where it is for the benefit of the next of kin, as in this case, the act requires that they must be dependent upon the intestate in whole or in part, and the record in this case shows that neither the brother nor sister, for whose benefit alone this action was brought, were dependent upon intestate within the meaning of said act of Congress, and, therefore, there can be no recovery in this case on account of the death of the intestate for the benefit of the sister or brother.

5. That, under the act of Congress, there can be no recovery for the benefit of the sister and brother unless there be some proof of the damages which they have sustained, and, under the said act, these damages are limited to pecuni-

ary loss, and in this case there is no evidence that either the brother or sister, for whom this action is brought, have suffered any pecuniary damages, and, therefore, there can be no recovery on account of the death of the intestate.

Judge Prince directed a verdict for the defendant for the two reasons:

First: Because there is now no State law providing for compensation for the wrongful death of one who meets his death while engaged in interstate commerce.

Second: That plaintiff's proof did not show, nor did it tend to show, that there was next of kin dependent upon deceased for support or any part thereof.

The plaintiff moved for a new trial, which was refused.

Plaintiff appealed on the following grounds and exceptions:

1. His Honor erred in granting defendant's motion to direct a verdict on the first ground upon which said motion was made, to wit: "The cause of action sued on in this case is based upon the statute laws of the State of South Carolina, whereas the testimony shows that plaintiff's intestate was an interstate employee engaged in interstate commerce on an interstate train, actually engaged in interstate business, at the time of his alleged injury, and therefore he has no cause of action, except under the federal statute, and there is, therefore, a fatal variance between the cause of action sued on and the case proved."

The error being in holding that the plaintiff has no cause of action, except under the federal statute and in holding that the plaintiff has no cause of action in this case under the statute law of the State of South Carolina.

2. His Honor erred in granting defendant's motion to direct a verdict on the second ground upon which said motion was made, to wit: "That the undisputed testimony shows that plaintiff's intestate, at the time of his injury and death, was in the employ of the defendant on an interstate

train running from Augusta, Georgia, to points within the State of South Carolina, and handling interstate commerce, and that he was actually injured and killed by cars loaded with freight moving in interstate commerce in attempting to uncouple the same for the purposes of expediting the interstate journey, and, therefore, he has no cause of action, except under the acts of Congress, which are exclusive in this case, and, on that account, there can be no recovery under any State statute or law."

The error being in holding that in this case the act of Congress is exclusive, and that the plaintiff in this case has no cause of action under the statute law of South Carolina.

3. His Honor erred in granting defendant's motion to direct a verdict on the third and fourth grounds upon which said motion was made, to wit:

"(3) That under the acts of Congress, applicable in this case, there can be no recovery in this case for the alleged beneficiaries for the reason that no cause of action is given for the benefit of the brothers or sisters, unless they were dependent upon the intestate employee, and, in this case, there is no evidence that they were dependent, either wholly or partially.

"(4) The right of action is given to the personal representatives for the benefit of certain designated parties, and where it is for the benefit of the next of kin, as in this case, the act requires that they must be dependent upon the intestate in whole or in part, and the record in this case shows that neither brother nor sister, for whose benefit alone this action was brought, were dependent upon intestate within the meaning of the said act of Congress, and, therefore, there can be no recovery in this case on account of the death of the intestate for the benefit of the sister and brother."

The error being in holding that there was no evidence in this case that the brother or sister was either wholly or partially dependent upon the intestate and in holding that

REF.]

April Term, 1914.

the evidence shows that the brother and sister were neither incapacitated to earn a living, and in holding that the brother and sister must depend upon the intestate for support by reason of incapacity or minority before they can recover.

4. His Honor erred in granting defendant's motion to direct a verdict on the fifth ground upon which said motion was made, to wit: "That under the act of Congress there can be no recovery for the benefit of the sister and brother unless there be some proof of the damages which they have sustained, and, under the said act, these damages are limited to pecuniary loss, and in this case there is no evidence that either the brother or sister, for whom this action is brought, have suffered any pecuniary damages, and, therefore, there can be no recovery on account of the death of the intestate."

The error being in holding that there was no evidence to be submitted to the jury upon the question of nominal damages, and his Honor erred in not submitting the question of nominal damages to the jury.

5. His Honor erred in refusing to grant plaintiff's motion for a new trial on the first ground upon which said motion was made, to wit: "That this case was, under the law, triable under the statute laws of the State of South Carolina."

The error being that this cause of action was based upon the statute laws of the State of South Carolina, and his Honor erred in holding that the plaintiff had no cause of action except under the act of Congress.

6. His Honor erred in refusing to grant plaintiff's motion for new trial upon the second ground upon which said motion was made, to wit: "That even if it was only triable under the Federal Employers' Liability Act, there was testimony sufficient to carry it to the jury."

The error being in his Honor holding that there was no testimony going to prove that the brother and sister were in any way dependent upon the intestate in whole or in part.

7. Because his Honor erred in holding that the act of Congress, known as the Employers' Liability Act, is exclusive of all State laws, whereas he should have held that said act only applies to cases where a deceased employee left some one dependent on him or left some one of the parties enumerated or mentioned in the statute, and does not apply in such cases as the one at bar.

Messrs. J. Howard Moore and C. M. Drummond, for appellant, cite: 93 U. S. 99; 163 U. S. 299; 6 Wall. 35; 22 How. 227-243; 79 S. E. 700; 218 U. S. 406; 219 U. S. 453; 230 U. S. 352; 187 U. S. 148; 11 Wall. 652; 143 U. S. 457; 138 U. S. 287; 161 U. S. 686; 140 U. S. 148; 15 Sup. Ct. Rep. 423; 169 U. S. 623; 225 U. S. 501.

Mr. Wm. P. Greene, for respondent, cites: *Statute exclusive*: 33 Sup. Ct. 651; 227 U. S. 59; 223 U. S. 1; 124 U. S. 465, 473; 228 U. S. 702. *Dependency necessary*: 227 U. S. 59; 227 U. S. 145; 228 U. S. 173.

July 16, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

This action was brought under the statute of this State, known as Lord Campbell's act (Civil Code, 1912, secs. 3955 to 3958), to recover damages for the alleged wrongful death of plaintiff's intestate, who was killed while in the service of defendant as a brakeman, by being knocked down and run over by some freight cars which he was attempting to uncouple. At the time of the accident the defendant and its said employee were both engaged in interstate commerce. The deceased was a young man, twenty years of age, who had never married. His father and mother were dead, but he left a brother and sister, for whose benefit the action was brought.

REP.]

April Term, 1914.

The Circuit Court held that the proof brought the case within the Federal Employers' Liability Act (35 U. S. Stat. at L. 65 ch.; 149 U. S. Comp. Stat. Supp. 1911, p. 1132), which superseded the State statute on the same subject, and that there was no evidence that either the brother or sister was dependent on deceased, and directed a verdict for defendant.

Appellant contends that, as the act of Congress gives a right of action in favor of dependent relatives, while the State statute gives the right in favor of relatives, whether dependent or not, the two statutes do not cover pre-

1 cisely the same field, and, therefore, the State statute was not superseded, in so far as it gives a right of action in favor of relatives who are not dependent. This is a misconception of the scope of the legislation of Congress. It deals with the liability of interstate carriers by railroads for injuries to their employees while both are engaged in interstate commerce. It creates and determines that liability. It is paramount and exclusive, and necessarily supersedes the State law upon that subject. Therefore, the liability of such carriers for such injuries must be tested solely by the act of Congress, which cannot be pieced out by the State law on the same subject. *St. Louis etc. Ry. Co. v. Hesterly*, 33 Sup. Ct. 703; 228 U. S. 702; 57 L. Ed. 1031, and cases cited: *Wabash R. Co. v. Hayes* (U. S.), filed May 25, 1914, 34 Sup. Ct. 729, 234 U. S. 86; *Erie R. Co. v. New York*, 34 Sup. Ct. 756; 233 U. S. 671.

It is contended further that, even in this view of the law, the testimony required submission of the case to the jury, because there was testimony from which the jury might have found that the surviving brother was dependent

2 on deceased. The only testimony which is relied upon to sustain that contention was that the brother, who is a farmer, resident in the State of Alabama, had been sick and unable to work for sometime, and was still so, at the time of the trial. But there was no testimony that deceased

had ever contributed anything to his support or maintenance, or had, at any time or under any circumstances, ever given him anything, or rendered him any service of pecuniary value; nor was there anything in the testimony to warrant the inference that he would have done so, if he had lived. Indeed, there was no testimony that the surviving brother's condition or circumstances were such that deceased would probably have felt impelled by the ties of brotherly affection to render him any service or assistance of pecuniary value, if he had lived. There was, therefore, no reasonable ground for expecting any pecuniary benefit to the survivor from the continuance of the life of the deceased. *Gulf etc. Ry. Co. v. McGinnis*, 33 Sup. Ct. 426, 228 U. S. 173, 57 L. Ed. 785, and cases cited.

Judgment affirmed.

8882

MATTHEWS v. ATLANTIC COAST LINE RY. CO.

(82 S. E. —.)

RAILROADS. PRESUMPTIONS. EVIDENCE. ISSUE FOR JURY.

Whether testimony is sufficient to rebut the presumption of negligence arising in case of live stock killed on railroad track is an issue for the jury.

Before C. J. RAMAGE, special Judge, Monk's Corner, November, 1913. Affirmed.

Action by W. J. Matthews against Atlantic Coast Line Railway Company. From judgment for plaintiff, and order refusing new trial, defendant appeals. The facts are stated in the opinion.

Messrs. Simeon Hyde and Octavus Cohen, for appellant, ask review of 93 S. C. 71, and cite: 4 Rich. 329; 4 McC.

REF.]

April Term, 1914.

161; 26 S. C. 49; 87 S. C. 174. Chamberlayne's Modern Law of Evidence, sec. 1085.

Mr. E. J. Dennis, for respondent, cites: 26 S. C. 49; 91 S. C. 104; 93 S. C. 71.

July 16, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This was an action brought by the plaintiff against the defendant for two hundred dollars for the killing of a mule on October 23, 1912, and resulted in a verdict in favor of the plaintiff for full amount sued for. The defendant appeals and by their exceptions make the following points: First. The killing of the stock was due to an unavoidable accident. Second. The verdict was against the manifest weight of the evidence. Third. The only evidence in the case showing how stock was killed showed without conflict that there was no negligence on the part of the defendant. Fourth. There was no evidence to support the verdict.

All the points made in this case were fully considered by this Court in the case of *McLeod v. Railroad Co.*, 93 S. C. 71, 76 S. E. 19, 705, and decided in that case. The effort in this appeal is to practically have the Court to overrule the principles therein announced and we see no reason to do so. The exceptions are overruled and judgment affirmed.

8883

TAYLOR v. SPARTANBURG RY. ETC. CO.
HENDERSON v. SPARTANBURG RY. ETC. CO.
(82 S. E. 404.)

STREET RAILWAYS. CARRIER AND PASSENGER. FARES.

1. A street railway company may make and enforce reasonable rules to facilitate its business and to protect itself against imposition and fraud.
2. A rule requiring a passenger holding a transfer ticket to take the next car at the point designated on the ticket is reasonable.
3. When a passenger enters a car at a point other than that designated by the transfer check which he has accepted and holds, the conductor is justified in refusing to receive the check, and in demanding fare, and if the passenger refuses under such circumstances to pay fare, the carrier is not liable for ejecting him.

Before MEMMINGER, J., Spartanburg, March, 1913.
Reversed.

Actions by Noah D. Taylor and David W. Henderson against Spartanburg Railway, Gas & Electric Company. From judgments for plaintiffs, defendant appeals.

Messrs. Sanders & DePass, for appellant, cite: *Right of carrier to make reasonable rules*: 1 Elliott Railroads, secs. 199, 200, 202; 81 S. C. 143; Clark (Street Railway) Accident Law, 2d Ed., p. 193, sec. 81; 110 App. Div. 429; 96 N. Y. Supp. 249; 4 St. Ry. Reports 866. *Ejection of passengers boarding car at a place not a transfer junction*: Note in 5 St. Ry. Reports 118; 35 Wash. L. Rep. 4; 1 Am. Ann. Cases 393. *Whether rule is reasonable a question for Court where facts are not disputed*: 78 S. C. 352. *As to waiver of rules*: 78 S. C. 356. *Tort committed in assertion of supposed right or without actual wrongful intent*: 69 S. C. 434.

FOOTNOTE.—See note on right of street car railroad company to limit time or point of transfer. 8 L. R. A. (N. S.) 287.

REP.]

April Term, 1914.

July 16, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

These actions were brought to recover punitive damages on account of the alleged wilful, wanton ejection of the plaintiffs from a car of defendant in the city of Spartanburg. The facts developed at trial were in substance: That on November 13, 1910, the plaintiffs boarded one of defendant's cars at Arkwright, on South Church street, in the city of Spartanburg, and paid the fare demanded. A "transfer ticket" was given to each of them for the purpose of allowing them to transfer from Church street line to the next succeeding car going east on the Main street line. These transfers in accordance with the rule of the company provided that plaintiffs must take the next succeeding car at the transfer point indicated on the ticket, to wit, where Main and Church streets cross each other. The plaintiffs did not board the car at this place, but walked up Main street to Liberty street, about two hundred yards from the place of transfer, and there got on the car going in the direction they desired to go. The conductor refused to honor these transfers, and when the car stopped at the next stopping place the plaintiffs refused to pay the fare demanded and disembarked from the car. There was a total absence of any evidence on the part of the plaintiffs showing any violence or rudeness on the part of the conductor; but the evidence was that he was courteous and polite in his demeanor and was only trying to enforce the rules of the company as made for his direction. At the conclusion of plaintiffs' evidence a motion for a nonsuit was made by the defendant and refused. When all of the evidence was in, a motion was made by defendant for a direction of verdict which was refused. His Honor holding that it was a question for the jury to determine whether the rule of the company was a reasonable one, and whether the rights of the plaintiffs had been wilfully invaded or recklessly disre-

garded. The jury rendered a verdict in favor of each of the plaintiffs for \$35, and defendant appeals and alleges error on the part of his Honor in not granting a *nonsuit* or directing a verdict as asked for, and leaving it to

1 the jury to determine the issue submitted. A street railway company has a right to make and enforce reasonable rules. 1st Elliott on Railroads, sections 199, 200, 202; *Funderburg v. Ry.*, 81 S. C. 143, 61 S. E. 1075, 21 L. R. A. (N. S.) 868.

We see nothing in the rule requiring a person holding a transfer ticket to take the next succeeding car at the point designated that is unreasonable. There was no evidence to show that when a passenger once paid, that he was

2 entitled as a matter of right to call for and demand a transfer ticket and ride to the point of his destination on any car. The car company had the right to make and enforce reasonable rules for its protection

1 against imposition and fraud. In this case the plaintiffs were furnished transfers, and if they had followed the instructions on these transfers they would have seen that the transfers would not be honored unless they took the next succeeding cars at the point designated in the transfers, being in these cases, where Main and Church streets cross each other. To allow a passenger who

3 obtains a transfer to board a car at any time or at any other point than that fixed by the transfer would nullify this reasonable rule of the company, which by both authority and reason it has the right to make, and the conductor was justified in demanding fare, and not receiving the transfers, when the passenger enters the car at a point other than that prescribed by the transfer check which the passengers had accepted; and if passenger refuses to pay under such circumstances the company is not liable for ejecting him. *Clark's Accident Law* (Street Railway, 2d Ed., p. 193, section 81.) The plaintiffs should have boarded the car at the point designated by the transfer. The uncon-

REP.]

April Term, 1914.

tradicted testimony shows that they walked *some* distance away from this point and boarded the car at a different place, this they did not have the right to do without paying the fare. When the transfers were refused and fare demanded plaintiffs were informed in a polite manner that they must pay or get off and the car was stopped and plaintiffs got off. There is no evidence in the case that shows that the plaintiffs were in any manner damaged, inconvenienced, rudely treated, insulted, annoyed, or that there was any wrongful invasion of their rights, or that there was any issuable facts for the jury to pass upon; and his Honor was in error in not granting a *nonsuit* or directing a verdict for the defendant as asked for. The judgments are reversed and complaints dismissed.

8884

WILSON, AS ADMR., v. SOUTHERN RAILWAY CO. *ET AL.*

(82 S. E. 481.)

APPEAL AND ERROR. EVIDENCE.

An objection to testimony not heard, and passed upon, by the trial Judge, cannot be made the subject of an exception on appeal.

Before SEASE, J., Yorkville, Fall term, 1912. Affirmed.

Action by C. S. Wilson, as administrator of the estate of D. Rainey Wilson, deceased, against Southern Railway Company and Ed S. Mott. From a judgment for defendants, plaintiff appeals.

Messrs. Henry & McLure, for appellant, submit: *The record of proceedings at coroner's inquest was inadmissible:* 66 S. C. 421. *So testimony as to such proceedings and verdict:* 84 Ala. 149; 68 L. R. A. 294. *Objection being*

made was sufficient basis for exception: 59 S. C. 243-4; 63 N. Y. 256; 17 Wis. 37; 55 S. C. 340.

Messrs. McDonald & McDonald, for respondents, submit: Objection to testimony did not state its grounds: 62 S. C. 546; 63 S. C. 559; 66 S. C. 61; 67 S. C. 419; 72 S. C. 411; 73 S. C. 104; 74 S. C. 246; 75 S. C. 74, 116, 201, 225. *If testimony was irrelevant, its admission was within the discretion of the Court:* 75 S. C. 116, 129, 201, and did not affect the verdict: 44 S. C. 548; 64 S. C. 112; 72 S. C. 174; 78 S. C. 33. *The overwhelming preponderance of the evidence sustains the verdict:* 78 S. C. 73; 91 S. C. 331; 93 S. C. 299, 426.

July 16, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This is the second appeal in this case. The first appeal is reported in 93 S. C. 17, 75 S. E. 1014. On the first appeal the case was sent back for a new trial, and was tried before Judge Sease and a jury, and resulted in a verdict in favor of the defendants. After entry of judgment plaintiff appeals, and by his exceptions raises one issue only; that the Circuit Judge committed error in allowing, over objection, certain testimony during the examination and cross-examination of T. J. Strait, one of plaintiff's witnesses, and in not granting a new trial. The record shows that Mr. Henry did object, but that the Circuit Judge made no ruling thereon for the reason as explained by him that he did not hear the objection made by plaintiff's counsel. It was the duty of counsel when objection was made by him to have the Judge rule on it, and the fact that he did not rule and states that he did not hear the objection is conclusive; and it must be taken as if the evidence was received as same as if unobjected to, for it must be presumed that the trial Judge will rule on any question properly presented to the

REF.]

April Term, 1914.

Court. It is the duty of counsel to raise objection to the admissibility of any testimony, stating the grounds of his objection, and it is the duty of the Court to make a ruling, and counsel should insist that a ruling be made. In this case his Honor states he heard no objection, and for this reason did not rule. We are bound to accept this statement as to what actually occurred, and the testimony when received was received as if unobjected to; and there was sufficient evidence to sustain the verdict.

The exceptions are overruled. Judgment affirmed.

MR. JUSTICE GAGE was disqualified, and did not sit in this case.

8885

EX PARTE J. L. WILLIAMS, JR.

IN RE ESTATE OF JAMES WILLIAMS.

(82 S. E. 402.)

APPEAL AND ERROR. GRANT OF ADMINISTRATION. ISSUES.

1. Where an appellant from the judgment of the probate Court fails to comply with the provisions of Rule 28 of the Circuit Court, by giving notice of motion for submission of issues to a jury, his exception on the ground that the Circuit Judge refused to submit such issues to a jury will be overruled.
2. Findings of fact by the probate Court concurred in by the Circuit Court as to the person who should administer upon an estate will not be disturbed on appeal.

Before C. J. RAMAGE, special Judge, St. Matthews, December, 1913. Affirmed.

The facts are stated in the opinion.

Mr. Jacob Moorcr, for appellant, submits: *Appellant was entitled to jury trial of issues*: Code Civil Proc., secs. 312, 326; 61 S. C. 568-569; 55 S. C. 198; 98 S. C. 271; 64

S. C. 234. *Widow cannot transfer right to administer to another*, 2 Strob. 335, *against wish of the largest creditor*: 2 Hill. 347; Rice 287.

July 16, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

This is an appeal from an order of Special Judge Ramage in affirming the judgment of the probate Court in appointing J. W. Mahoney administrator of the estate of James Williams, deceased, instead of the appellant, J. L. Williams, Jr.

The exceptions allege error on the part of the trial Judge in not submitting issues to the jury as asked for on the part of the appellant, as to the question of marriage of the deceased to two women, and which one was his lawful wife,

and who were his legitimate children. The excep-

1 tions are overruled for the reason that the appellant failed to comply with rule 28 of the Circuit Court; and we have a concurrent finding of the probate Court and Circuit Court as to the facts involved and under

2 the authority of *Ex parte Smalls*, 69 S. C. 43, 48 S. E. 40; *Ex parte Frierson*, 96 S. C. 34, 79 S. E. 791. Judgment is affirmed.

8886

ANDREWS *v.* ATLANTIC COAST LINE RAILROAD CO.

(82 S. E. 403.)

CARRIERS. PENALTIES FOR FAILURE TO SETTLE CLAIMS WITHIN FORTY DAYS. ESTOPPEL. EVIDENCE.

1. Where consignee having claim against carrier receives within forty days, from the carrier an order for payment of money, knowing that the order was delivered as payment, and retains it until the expiration of the forty days, and then returns it to the carrier, he

Rep.]

April Term, 1914.

- is estopped to claim the penalty for failure to settle within forty days.
2. Testimony as to former settlement of claims made by plaintiff against the carrier by means of written orders like that left with plaintiff was admissible in evidence, on question of settlement.
 3. In an action against a carrier for loss on freight and penalty for nonpayment within 40 days, testimony as to defendant's dealings with other claimants was properly excluded.

Before SEASE, J., Sumter, November, 1913. Reversed.

Action by W. J. Andrews and M. H. Andrews, doing business as W. J. Andrews & Son, against Atlantic Coast Line Railroad Company. From judgment for plaintiff, defendant appeals.

The facts are stated in the opinion of the Court.

Mr. Mark Reynolds, for appellant, cites: *Not necessary to plead estoppel*: 27 S. C. 235; 3 S. E. 214; 6 Enc. Pl. & Pr. 356; 81 S. C. 332. *Waiver cannot be plead as an estoppel; it is evidence only*: 15 Phila. 217; and *may be shown under general issue*: 8 Enc. Pl. & Pr. 6, 7; 98 Mich. 591. *Instructions as to waiver, and exclusion of evidence with reference thereto erroneous*: 71 S. C. 329.

Messrs. L. D. Jennings and R. D. Epps, for respondent.

July 17, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

This is an action for seventy-two cents loss on freight and fifty dollars penalty, for nonpayment within forty days. There is evidence that an agent of the defendant called at the plaintiff's place of business and left an order for the payment of the seventy-two cents within the forty days. That the place of destination was not a pay station

and the order was payable at Sumter, several miles away. That one of the plaintiffs knew that the order was in his store, but did not return it, nor notify the agent that he would not accept it, until after the expiration of the forty days. One of the plaintiffs testified: "Q. Then don't you think he had the right to assume that you had gone and gotten your money? A. I guess he could suppose so if he wanted to, for I had been taking payment that way; the ones that passed through his hands." The plaintiffs were not bound to take anything but money, but they could not legally demand or bring suit for the money while he still held the defendant's order for the money. The evidence is not clear as to when the order was returned. One of the

plaintiffs at first refused to return the order. If the
1 plaintiffs received through their agent an order for the money, and they knew it had been delivered as payment, and had received other orders as payment, and did not notify the defendant that the order would not be accepted as payment until the penalty had accrued, then the plaintiffs are estopped to claim the penalty.

The magistrate was not in error in excluding evidence as to dealings with other claimants, but was in error

2 in excluding evidence as to the former dealings with plaintiffs.

There are many exceptions in which there are many repetitions, but the above covers them all.

The judgment is reversed.

REP.]

April Term, 1914.

8887

BEACH, AS GUARDIAN, v. ADDISON ET AL., AS EXRS.

(82 S. E. 428.)

EXECUTORS AND ADMINISTRATORS. GUARDIAN AND WARD. PREMATURE ACTIONS. APPEAL AND ERROR.

Under 1 Code of Laws, sec. 3962, an action cannot be brought by general guardian of an infant against the personal representatives of a former guardian of the infant for an accounting, and to ascertain the amount due by his estate to the infant, within twelve months after such guardian's death. Where a question is considered on Circuit it will be presumed to have been properly before the Court.

Before GAGE, J., Hampton, October, 1913. Reversed.

Action by Lewis C. Beach, as general guardian of Florence B. Addison, against Ezekiel Williams Addison and Richard Grady Addison, as executors of J. C. Addison, deceased. From a decree for plaintiff, defendants appeal. The facts are stated in the opinion.

Messrs. Grier, Park & Nicholson, for appellants, cite: *Statute forbidding action within one year*: 1 Civil Code, sec. 3962. *Objection does not appear to have been waived*: 3 Cyc. 155; 53 S. C. 313; 23 S. C. 125. *This proceeding is an action*: Code Civil Proc., sec. 2; Statute construed in 3 Rich. 182; 29 S. C. 254; Harper L. 138; Nott & McC. 259; 9 S. C. 436; 7 Rich. Eq. 40; 44 S. C. 390, 391, *distinguished*. So, also, 2 Strob. 83. *The amount due the ward is a debt due and unpaid, the right to recover which is suspended by law for a certain period*: 8 Rich. Eq. 251. *Probate Court has no jurisdiction to compel executors to account for the acts of their testator as guardian*: Const. 1895, V, sec. 19, 1868, IV, sec. 20; 1 Civil Code, secs. 3765, 3767; 28 S. C. 583, 586; 25 S. C. 248; 4 Rich. L. 7; 8 Rich. Eq. 251, *do not apply to these proceedings*. *As to method of accounting*: 1

FOOTNOTE.—As to the right of a ward to file a claim against the estate of his deceased guardian, see note, 26 L. R. A. (N. S.) 793.

Civil Code, secs. 3766 and 3648; 2 S. C. 112; 19 S. C. 567; 3 Hill 304; 57 S. C. 42.

Messrs. Howell & Gruber, for respondent, submit: *This proceeding not for recovery of a debt. Purpose of statute:* 2 Nott. & McC. 528; 9 S. C. 436; 44 S. C. 390, 391. *Executors hold no interest in assets of ward:* 26 S. C. 538. *No action on administration bond until accounting has been had:* 1 Civil Code, 3766; 3 McC. 237; 4 McC. 121; 4 Rich. L. 5; 25 S. C. 248; *Ib.* 586; 64 S. C. 290; 2 Strob. Eq. 85. *That the executors may be required to account within the year:* 23 N. E. 1054. *As to jurisdiction of probate Court:* 1 Civil Code, sec. 3767; 9 Enc. Pl. & Pr. 956; 11 Am. & Eng. Ency. Law 1182; 8 Am. St. Rep. 683. *Annual returns ex parte only:* 15 Am. & Eng. Ency. Law (2 ed.) 114; 11 *Ib.* 1184, and note; 41 S. C. 493; 2 McC. Ch. 196.

July 17, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

J. C. Addison, guardian of Florence B. Addison, an infant, died on the 26th December, 1912. Lewis C. Beach was appointed guardian in his stead on the 16th January, 1913. J. C. Addison left a will, in which the appellants were appointed executors. The record does not show the date of the probate of the will, but it could not have been before the death of the testator, J. C. Addison, to wit, 26th December, 1912. On the 10th February, 1913, Lewis C. Beach commenced suit in the probate Court for Hampton county in which he alleged:

"That your petitioner is advised and believes, and so alleges, that it is necessary that the said Ezekiel Williams Addison and Richard Grady Addison, as executors of the estate of the said J. C. Addison, deceased, should be cited to appear before this Honorable Court and render a true and correct account of the actings and doings of the said J. C. Addison, deceased, as general guardian of the infant, Flor-

REF.]

April Term, 1914.

ence B. Addison, to the end that the amount due the said Florence B. Addison by the estate of the said J. C. Addison, deceased, as general guardian as aforesaid, may be ascertained by judgment and decree of this Honorable Court, and judgment and decree rendered therefor."

The prayer of the petition asks that the amount due "be ascertained and judgment and decree rendered by this Honorable Court, fixing and adjudicating such amount."

The appellants answered and pleaded to the jurisdiction of the Court in that the suit had been commenced within the year. The probate judge said in his decree that the question was abandoned at the hearing before him, but the Circuit Judge passed upon the question and we must assume that the question was properly before him. Both appellant and respondent argued the question before this Court and we must consider it. The Circuit Judge overruled the plea to the jurisdiction and the executors appealed.

The question is, could the Court entertain jurisdiction of a suit like this within twelve months from the date of the death of the intestate?

The statute (1 Code of Laws 1912, sec. 3962) reads: "No action shall be commenced against any executor or administrator for the recovery of the debt due by the testator or intestate, until twelve months after such testator or intestate's death."

This was an action for a debt; the amount to be ascertained by an accounting. This is not an action for specific personal property. It is not an action to enforce a lien, with no demand for a judgment for a deficiency. The proceeding is to obtain a judgment for a debt brought within the twelve months. No other questions arise. Any other finding would be a nullity.

Judgment reversed.

MR. JUSTICE GAGE was disqualified and did not sit in this case.

8888

CENTRAL NATIONAL BANK v. GRIMES.

(82 S. E. 420.)

NEGOTIABLE INSTRUMENTS. INNOCENT HOLDER. DIRECTION OF VERDICT.

The undisputed testimony showing that plaintiff is a *bona fide* holder and assignee for value before maturity of negotiable notes, and there being no evidence to show that he had notice of any want of consideration, a verdict should have been directed in his favor in action on such notes, under *Commerce Trust Co. v. Grimes*, 98 S. C. 220, 82 S. E. 420.

Before BOWMAN, J., Walterboro, November, 1913. Reversed.

Action by Central National Bank against M. L. Grimes, W. F. Carr, B. L. Cox, W. H. Cox, J. P. Gay, H. H. Butler and Thomas Southwell. From a judgment for defendants, plaintiff appeals.

Messrs. Smythe & Visanska, for appellant, submit same authorities as in *Commercial Trust Co. v. Grimes*, in this volume.

Messrs. Howell & Gruber and Peurifoy Bros., for respondent, submit same authorities as in *Commerce Trust Co. v. Grimes*, in this volume.

July 17, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

The facts in this case being substantially the same as those in the case of *Commerce Trust Company v. M. L. Grimes et al.*, the judgment is reversed, for the reasons therein stated.

REF.]

April Term, 1914.

8890

HAMBRIGHT v. SOUTHERN RAILWAY—CAROLINA DIV.

(82 S. E. 416.)

PLEADINGS. AMENDMENT. COSTS. APPEAL AND ERROR.

1. An order permitting an amendment to substitute a third party as defendant instead of the original defendant, is in effect a dismissal of the action against the original defendant, and not prejudicial to its rights, and an appeal by the original defendant will not lie from such order, except as to costs.
2. Upon the dismissal of action against original defendant, and the substitution of another in his stead, the original defendant should be allowed to tax costs against the plaintiff.

Before DEVORE, J., Gaffney, November, 1913. Modified.

Action by Nannie S. Hambright against Southern Railway—Carolina Division. From an order permitting plaintiff to amend his complaint by changing the title, so that the name of the defendant as set forth therein be Atlanta and Charlotte Air Line Railway Company, defendant, Southern Railway-Carolina Division, appeals.

Messrs. Sanders & DePass, for appellant, submit: *Entire change of parties defendant not permitted by Code Civil Proc. 224; 13 S. C. 397; 32 S. C. 142.*

Messrs. Otts & Dobson, for respondent, cite: *Code Civil Proc.*, sec. 224. *Summons and complaint was served on an agent, who represented both the Southern Railway Company, lessee, and the Atlanta and Charlotte Air Line Railway Company, the lessor, and defendant came into Court and answered to the merits: 35 S. C. 378; 46 S. C. 11; 61 S. C. 579; 67 S. C. 231; 71 S. C. 425. Sole defendant may be struck out and another substituted: 71 S. C. 425; 51 S. C. 316; 13 S. C. 495; Bailey Eq. 181; 81 S. C. 498; 13 S. C. 402. Allowance of amendment was in discretion of the Court: 18 S. C. 315; 32 S. C. 69; 48 S. C. 565. Misnomer*

of defendant waived by appearance and plea to merits: 31 Cyc. 737 and 738; 22 S. C. 188.

July 17, 1914.

The opinion of the Court was delivered by Mr. CHIEF JUSTICE GARY.

This is an appeal from an order allowing the plaintiff to amend the summons and complaint, by substituting the name of "Atlanta and Charlotte Air Line Railway Company," instead of the defendant, "Southern Railway—Carolina Division;" also from an order refusing the motion, to allow the defendant to tax costs against the plaintiff.

The order allowing the amendment was, in effect, a dismissal of the complaint against the defendant, Southern Railway—Carolina Division, and was not prejudicial to its rights. Therefore the exception assigning error in this respect is overruled. But, as the order was, practically, a dismissal of the complaint, the defendant was entitled to its costs, and there was error in refusing to allow the defendant to tax them against the plaintiff.

Modified.

8892

COMMERCE TRUST CO. v. GRIMES *ET AL.*

(82 S. E. 420.)

NEGOTIABLE INSTRUMENTS. INNOCENT HOLDER. DIRECTION OF VERDICT.

The undisputed testimony showing that plaintiff is a *bona fide* holder and assignee for value before maturity of negotiable notes, and there being no evidence to show that he had notice of any want of consideration, a verdict should have been directed in his favor in action on such notes.

Before BOWMAN, J., Walterboro, November, 1913. Reversed.

REP.]

April Term, 1914.

Action by Commerce Trust Company against M. L. Grimes, W. F. Carr, B. L. Cox, W. H. Cox, J. P. Gay, H. H. Butler and Thomas Southwell. From judgment for defendants, plaintiff appeals.

The facts are stated in the opinion.

Messrs. Smythe & Visanska, for appellant, cite: *Case governed by* 91 S. C. 455, 80 S. E. 460. *The circumstance that one of the McLaughlin Bros. was a stockholder in plaintiff company is immaterial:* 26 S. W. 975, 977; 10 Cyc. 1061; 74 S. C. 368, 374. *As to bona fides:* See 1 Pac. 789; 19 S. E. 561; 92 N. W. 348; 106 N. W. 942; 142 N. W. 139; 129 Pac. 798; 47 N. E. 196; 26 S. W. 975; 24 Atl. 356.

Messrs. Howell & Gruber and Peurifoy Bros., for respondents, cite: *As to burden of proof:* 91 S. C. 455. *As to what circumstances are sufficient to put a purchaser of negotiable paper on inquiry:* 44 L. R. A. (N. S.) 395, 399, and note.

July 17, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

This is another action on a note given by persons in this State to McLaughlin Bros.

The undisputed evidence showed that the respondents executed negotiable notes to McLaughlin Bros. That the notes were assigned for value before maturity to the appellant and there is no evidence to show that the assignee had notice of any want of consideration.

This case is governed by the case of *The Bank v. Wallace*, 97 S. C. 52, 80 S. E. 460; and *The Bank v. Stackhouse*, 91 S. C. 455, 74 S. E. 977, 40 L. R. A. (N. S.) 454.

In the former case the Chief Justice, in delivering the opinion of this Court, said:

"When the case of *Bank v. Stackhouse*, 91 S. C. 455, 74 S. E. 977, 40 L. R. A. (N. S.) 454, was decided by this Court, it did not seem to the writer of this opinion that the plaintiff therein, was *prima facie* a *bona fide* holder of the note upon which the action was brought.

The principles then announced are practically the same as those involved in the present case. He, therefore, feels constrained to follow that case as an authority as long as it remains of force."

This Court is bound by those two opinions to reverse the judgment in this case. A verdict for the plaintiff in this case should have been directed. No other questions arise.

The judgment appealed from is reversed.

8893

DALY v. JEFFERSON HOTEL CO.

STANDEN v. JEFFERSON HOTEL CO.

CASELLO v. JEFFERSON HOTEL CO.

(82 S. E. 412.)

MASTER AND SERVANT. BREACH OF CONTRACT OF EMPLOYMENT. QUANTUM MERUIT.

1. A recovery upon *quantum meruit* cannot be had for services rendered, in the absence of testimony as to the value of the services.
2. An employee cannot recover upon *quantum meruit* for services rendered under a contract where, without justification or excuse, he abandons the contract before the end of the term.

Before MEMMINGER, J., Columbia, October, 1913. Reversed.

Actions by Jefferson D. Daly, Thomas Standen and Rudolph Casello against Jefferson Hotel Company. From order remanding cases to the magistrate's Court for a new trial, defendant appeals.

The facts are stated in the opinion.

REP.]

April Term, 1914.

Messrs. Nelson, Nelson & Gettys, for appellant, cite: 2 Labatt Master and Servant, secs. 491, *et seq.*; 4 McC. 246; 1 Hill 401; 84 S. C. 73.

Mr. C. S. Monteith, for respondent.

July 17, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

The record shows the following:

"The above cases were tried before Magistrate H. F. Beuchel, of Richland county, the plaintiff, Daly, demanding fifty-four and 21-100 (\$54.21) dollars, wages due him for services rendered as steward at the Jefferson Hotel from June 16 to June 28, 1913, both inclusive; the plaintiff, Standen, demanding forty-three and 29-100 (\$43.29) dollars, which he alleged to be due him as wages for services rendered as chef of the Jefferson Hotel from June 16 to June 28, 1913, both inclusive, and the plaintiff, Casello, demanding thirty-two and 50-100 (\$32.50) dollars for services due him as night chef at the Jefferson Hotel from June 16 to June 28, 1913, both inclusive.

The form of the complaint in each case is the same. The following is a copy of the complaint in the Daly case:

Complaint has been made unto me by Jefferson D. Daly that you are indebted to him in the full and just sum of fifty-four and 21-100 (\$54.21) dollars, wages due the said Jefferson D. Daly for services rendered as steward, from June 16th to June 28th, A. D. 1913, inclusive; the same being thirteen days wages at the rate of four and 17-100 (\$4.17) dollars per day.

That due demand for the payment of said wages has been made upon you, but no part thereof has been paid.

The defendant answered in each case and in each case set up a counterclaim. Each answer contained for a first defense a general denial.

In the case of Jefferson D. Daly, the defendant set up a counterclaim for eight and 95-100 (\$8.95) dollars, money actually advanced, and for ninety (\$90) dollars damages alleging the plaintiff, Daly, was under contract of employment with defendant to serve defendant as steward for the month of June, 1913, and that the said Daly did on June 28th wilfully breach his said contract of employment and did wilfully, with intent to injure defendant, induce and persuade other employees of defendant to leave the service of defendant and breach their contracts of employment, whereby the defendant was left without warning and notice, without sufficient help to conduct its business and was forced to close its dining room in the midst of a meal and was forced to turn patrons away, and was put to expense and inconvenience in procuring other help.

In the case of Thomas Standen and Rudolph Casello in the counterclaim the defendant demanded seventy-five (\$75) dollars in each case on account of the alleged wilful breach of contract, as set out above in the case of Jefferson D. Daly, the only difference being that there was no allegation that these plaintiffs had induced others to leave the employment of the defendant.

The cases came on for trial before Magistrate Beuchel, and, upon motion of plaintiffs' attorneys, the counterclaims were stricken out in each case, except so much of the counterclaim in the case of Jefferson D. Daly for the amount actually advanced as alleged, \$8.95."

The magistrate found for the plaintiff in each case. The defendant appealed, and the appeal was heard by Judge Memminger on Circuit, who made the following order:

"This case comes before me on an appeal from the judgment in favor of plaintiff in the Court of Magistrate H. F. Beuchel. The two main issues presented by the exceptions are that the magistrate erred (1) in striking out the counterclaim interposed in the defendant's answer and in refusing to hear testimony in support thereof; and (2) in refusing

REP.]

April Term, 1914.

defendant's motion for a nonsuit at the close of plaintiff's testimony, and refusing to direct a verdict for the defendant at the close of all the testimony, upon the grounds set out in the exceptions.

"I think that the magistrate erred in striking out the counterclaim and in refusing to hear testimony in support thereof, and the exceptions raising this question are sustained.

"The assignment of error in refusing a nonsuit and to direct a verdict involves the question of whether a servant who is employed at a stated salary per month, but who voluntarily quits the service of the master before the expiration of the month, is entitled to recover on a *quantum meruit* for the service actually performed. I am of the opinion that the law does not preclude a recovery by the servant for the value of the services actually performed, even though he voluntarily and without just cause quits the service of the master before the expiration of the month. The exceptions alleging error in refusing a nonsuit and to direct a verdict are overruled. In my opinion, the measure of damage in such cases is the reasonable value of the service performed by the servant up to the time of his quitting the master's employ, less any damages sustained by the master on account of the breach of contract by the servant.

"It is therefore ordered that the judgment be reversed and the case remanded to the magistrate for a new trial in accordance with the principles laid down in this order."

There is no appeal from this order, so far as it affects the counterclaim, and that position cannot be considered. The defendant appealed from the order, and raises two questions:

1st. Was there any evidence to support a judgment upon a *quantum meruit*?

2d. Can an employee recover upon *quantum meruit* for services actually performed under a contract, when he quits

the service without justification or excuse, before the end of the term of service?

The first question must be answered in the negative. There was no evidence of the value of the services rendered. The only evidence from which a conclusion could be drawn

was the contract, and it is undisputed that the plain-

1 tiff broke the contract and no excuse was offered.

The plaintiff can, therefore, get no help from a contract which he himself has broken.

The second question must also be answered in the negative. An employee cannot recover for services actu-

2 ally rendered upon a *quantum meruit* where he, without justification or excuse, abandons the contract

before the end of the term.

"When the employer wantonly and without cause turns off his overseer, at a season of the year when it would be impossible to get employment elsewhere and his time is wholly lost, I should feel no hesitation in enforcing the rule rigidly, not only as a punishment, but as a just remuneration to the overseer; and so when the overseer abandons the employment without cause or by his neglect inflicts a loss on him commensurate with the services which he has performed, he clearly deserves no compensation." *Byrd v. Boyd* (4 McCord), 15 S. C. L. 247, 12 Am. Dec. 740.

The judgment of this Court is that the order appealed from be reversed.

8894

KEENAN v. MATTHEWS.

(82 S. E. 431.)

CONTRACTS. BROKERS AND COMMISSION MERCHANTS. SALES SUBJECT TO COMMISSIONS.

Under a contract providing C. was not to cut or sell any timber for five years without written consent of K., and that when sold or delivered, C. should pay K. a commission of five per cent. on all timber sold, K. held not entitled to commissions on timber sold five years after date of contract.

REF.]

April Term, 1914.

Before WILSON, J., Lexington, November, 1913. Affirmed.

Action by William J. Keenan against J. L. Matthews, as administrator with will annexed, *de bonis non*, of estate of George C. Clark, deceased, *et al.*, to recover commissions on sales of certain timber, under the following contract:

The State of South Carolina, County of Lexington.

This agreement made and entered into this 22d day of October, in the year of our Lord one thousand nine hundred and two, by and between George C. Clark, of the said county and State, party of the first part, and William J. Keenan, of the city of Columbia, said State, party of the second part: Witnesseth:

Whereas, The said party of the first part did on the 22d day of October, A. D. 1902, purchase from the said party of the second part a tract of land situate in the county of Lexington, said State, described as follows, to wit:

All that certain tract of land in said county and State, containing two thousand and twenty-nine (2,029) acres, known as the Felder or New Mill Tract, bounded on the north by lands now or formerly of Noah Shumpert's estate; northeast by Tom C. Smith; east by Jake Shealy's estate and J. Hallman; south by Cedar Pond Branch; west by lands now or formerly of Day estate and Jake Smith, and northwest by Charlie Bouknight.

And as a part of the consideration for the deed thereof, the party of the second part did take a mortgage for the purchase money.

Now, as a further consideration for the said deed of conveyance, the *parties hereto do hereby covenant and agree:*

That the said George C. Clark, party of the first part, shall send, consign, ship and deliver, free on board at any station or siding on the Southern Railway, subject to the order of the party of the second part, in carload quanti-

ties, all the rosin made or taken from the trees, *upon said land* for a period of five (5) years from the date of these presents. Said rosin to be strained through wire and good cotton batting and to be delivered in good merchantable packages, bound each with four iron hoops and each having a lining hoop; and the said party of the first part is to ship to the said party of the second part, at Columbia, South Carolina, all the spirits of turpentine, made upon the said premises, during said period of five (5) years. Such spirits of turpentine to be delivered at such place in the said city of Columbia as said party of the second part may be prepared to receive and gauge it.

And for the purpose of making effectual this contract for the full period of time it shall run, and to enable the party of the second part to specifically enforce the same against the party of the first part, his heirs, executors, administrators, assigns or successors in interest, the party of the first part hereby grants, sells and conveys to the party of the second part, his heirs and assigns, the turpentine trees on the said tract of land above described. To have and to hold the same until this contract shall be fully performed by the party of the first part, his heirs, executors, administrators, assigns or successors in interest—such interest hereby conveyed to cease and be of no effect upon the full completion and termination of this contract.

The said party of the first part further hereby covenants and agrees that he will send, consign and deliver, free on board cars at any station or siding on the Southern Railway, subject to the order of the party of the second part, in carload quantities, all the rosin made, owned, controlled, distilled for others, or in any way acquired between the date of these presents and the close of the turpentine year and season of 1904, upon the following described tract of land, which said tract of land is under lease to said party of the second part—and which said lease the party of the first part for himself, heirs, executors and administrators,

REP.]

April Term, 1914.

hereby agrees faithfully and fully to perform and carry out:

All that certain tract of land in said county and State, containing six hundred and eighteen (618) acres, lying between Swansea, on the Seaboard Air Line Railway, and Pelion, on the Southern Railway—being the same tract referred to in the lease from Simon P. and M. A. M. Wingard to said George C. Clark.

The said rosin is to be strained through wire and good cotton batting, and to be delivered in good merchantable packages, bound each with four iron hoops, and each having a lining hoop, and the said party of the first part is to ship to the said party of the second part all the spirits of turpentine made, owned, controlled, distilled for others, or in any way acquired between the above named dates. Said spirits of turpentine to be delivered in such place in said city of Columbia as the party of the second part may be prepared to receive and gauge it.

The said party of the second part agrees to allow the said party of the first part Savannah market value, at the time of the shipment, or as soon thereafter as obtainable, for all said rosin, less twelve and one-half ($12\frac{1}{2}$) cents per hundred pounds, as freight, and six (6), four (4) and nine (9) cents per package for drayage, storage and inspection, weighing and cooperage charges, and two and one-half ($2\frac{1}{2}$) per cent. commissions, or an agreed price per round or tale barrel. In no case is the price for said rosin to exceed the selling price at New York, less twenty-five (25%) per cent. per two hundred and eighty (280) pounds, and the stipulated charges for freight, commissions, etc., and five and one-half ($5\frac{1}{2}$) cents per gallon less the Savannah market quotations for all spirits of turpentine shipped to Columbia, South Carolina, less freight to said city of Columbia; said turpentine to be merchantable, white and clear; said price to be in bulk, or without the barrel.

It is further covenanted and agreed between the parties hereto that for the purpose of and as a means of securing to the said party of the second part the shipment to him of all the above described rosin and spirits of turpentine as stipulated herein, it is hereby agreed that for each and every barrel of rosin and spirits of turpentine made, owned, controlled, distilled for others, or in any way acquired as hereinabove set forth by the said party of the first part and not shipped to the said party of the second part, that the said party of the first part agrees to allow the said party of the second part fifty (50) cents; said forfeit to be as in the nature of liquidated damages, and recoverable on and after the 15th day of January, A. D. 1904.

It is further agreed, that if, at the time of shipment of said rosin, the quotations be nominal, with no demand at such figures or quotations that the said party of the second part be permitted to hold said rosin until such time as a demand in marketable quantities shall occur, and account-sales rendered or proceeds credited in accordance therewith.

That all inspection of said rosin is to be subject to the retest of the Union Naval Stores at Brooklyn, N. Y., or authorized inspectors at point of destination.

The said party of the first part agrees to execute a renewal of this contract annually for four consecutive years, commencing on the termination of this contract, and to be renewed annually thereafter on said date for said term of years.

The said party of the first part further agrees to execute a chattel mortgage on all personal property now owned by him, including distillery, mules, wagons, harness, crude and manufactured rosin and spirits of turpentine and such other personal property as may be purchased by him for the proper conduct of the business to be operated on the said two tracts of land hereinabove described as additional security to the said party of the second part for the payment to him of all indebtedness under the said mortgage given by the said party

REF.]

April Term, 1914.

of the first part to the said party of the second part on this the 22d day of October, A. D. 1902.

It is further agreed that the said party of the first part shall faithfully and competently conduct the business of boxing, dipping, scraping, hauling, distilling and delivering in merchantable packages, all the available product of all available boxes on said two tracts of land above described, and that the proceeds of said product be placed to the credit of the account of said party of the first part, and only such moneys and supplies be drawn for against said proceeds as may be necessary for the proper and economical conduct of said business.

It is further agreed that the said party of the first part is not to cut, saw, hew or sell any live pine timber now on the said tract first above described for the term of five years from the date of these presents, except with the approval and consent in writing of the said party of the second part, and when sold or delivered, the said party of the first part hereby further agrees to allow the said party of the second part a commission of five (5%) per cent. on all lumber or timber sold from the said tract of two thousand and twenty-nine (2,029) acres of land above described.

To the true performance of all and every of the foregoing covenants and agreements the said parties each to the other do hereby bind themselves, their heirs, executors, administrators and assigns.

In witness whereof, the parties hereto have hereunto set their hand and seals, this 22d day of October, in the year of our Lord one thousand nine hundred and two. George C. Clark (L. S.), William J. Keenan (L. S.). Signed, sealed and delivered in the presence of C. M. Asbill, B. D. Clark.

The facts are stated in the Circuit decree, recited in the opinion.

Mr. Edward L. Craig, for appellant, cites: 84 S. C. 153; 65 S. C. 195; 61 So. 644.

Messrs. E. L. Asbill, C. M. Efrid and J. B. Wingard, for respondents, cite: *As to meaning of "when sold."* 30 Am. & Eng. Enc. of L. (2 ed.) 512; Page Contracts, sec. 1104; 78 S. C. 8.

July 17, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

The appellant, in his argument, states:

"The principal question at issue in this case and the only question involved in this appeal, is the construction of that portion of a certain contract entered into between William J. Keenan and George C. Clark."

The exceptions allege error on the part of the presiding Judge in concluding that it was necessary for the timber to have been sold within five years from the date of the contract in order for Keenan to be entitled to the five per cent."

Judge Wilson's decree is as follows:

"The issue in controversy arises under the following provision in a bilateral contract executed on the 22d day of October, 1902, by the deceased, George C. Clark, and the plaintiff, William J. Keenan:

'It is further agreed that the said party of the first part is not to cut, saw, hew or sell any live pine timber now on the said tract first above described for the term of five years from the date of these presents, except with the approval and consent in writing of the said party of the second part, and when sold or delivered, the said party of the first part hereby further agrees to allow the said party of the second part a commission of five per cent. on all lumber or timber sold from the said tract of two thousand and twenty-nine acres of land above described.'

REP.]

April Term, 1914.

"The question was fully argued before me by the attorneys for both sides, the pleadings, the contract and the mortgage executed by the said George C. Clark to the said William J. Keenan, of even date with the said contract in question were submitted to me during the argument."

"My construction of the portion of the contract above quoted is, the party of the first part thereto was not to cut, saw, hew or sell any live pine timber on the tract of land at the time of the execution of the contract for a period of five years from the date of the contract without the approval and consent in writing of the party of the second part, and if the party of the second part consented to said sale, or any timber was sawed, hewed or cut within the five years, by the party of the first part, with the approval and consent in writing of the party of the first (*i. e.*, second?) part, then the party of the first part should allow the party of the second part a commission of five per cent. on all lumber or timber sold or cut from the said tract of land."

"Under the testimony it appears that the timber in question was sold more than ten years after the execution of the contract in question."

"Therefore, my conclusion is that the plaintiff is not entitled to a commission of five per cent. on the amount realized from the sale of the timber in question."

This decree is entirely satisfactory to this Court and is affirmed for the reasons therein stated.

8895

CHURCH v. MOODY.

(82 S. E. 428.)

LIMITATION OF ESTATES. DEEDS. RULES OF CONSTRUCTION.

1. The word "my" construed as "her" in a conveyance to a wife and "the heirs of my body begotten in wedlock with" said wife, and to give the wife a fee conditional special in the lands conveyed, in order to effectuate the evident intention of the grantor.
2. The language of the warranty clause in a deed may be considered for the purpose of ascertaining the meaning of an ambiguous or doubtful expression in the *habendum* clause.
3. If an ambiguous or doubtful expression is used in the *habendum* clause of a deed the Court in ascertaining the intention of the parties will incline to a construction against the interest of the grantor rather than to a construction in favor of his interest.
4. The construction placed by the grantor upon a deed after its execution is immaterial in ascertaining the true construction to be given.
5. The construction placed upon a deed by the grantee in a subsequent deed may be material in considering his rights under it.
6. A grantee being doubtful of his title and accepting a return of the consideration he had paid therefor, cannot still claim the land.

Before SPAIN, J., Dillon, 1913. Affirmed.

Action for partition of lands by Laler Church against Clyde Scott and W. T. Moody. From a decree in favor of plaintiff, the defendant, Moody, appeals.

The decree appealed from is as follows:

By consent of all parties this action for partition was heard by me at chambers upon an agreed statement of facts, a jury trial upon the issue of title having been waived.

Briefly stated, the facts are as follows: On November 12, 1892, Nathan Scott, then being the owner of the land sought to be partitioned in this action, conveyed the same to his wife, Margaret Scott, "and the heirs of my body begotten in wedlock with my wife, Margaret Scott," with *habendum* to "Margaret Scott and the heirs of my body begotten in wedlock with my wife, Margaret Scott." This deed was duly recorded in the proper office. At the date of this deed Mar-

REP.]

April Term, 1914.

garet Scott and Nathan Scott had one child living, the plaintiff, Laler Church, and subsequently another child was born to Margaret Scott and Nathan Scott, the defendant, Clyde Scott. Margaret Scott continued to hold the land without making any disposition of it until her death intestate in 1907. She left surviving her in addition to her husband, Nathan Scott, her two children born of her marriage with Nathan Scott, namely, Laler Church and Clyde Scott. On December 31, 1908, Nathan Scott made a straight fee simple deed for the premises to the defendant, W. T. Moody. Subsequently Laler Church brought this action, alleging that she and Clyde Scott were seized in fee of the premises as tenants in common in equal proportions, and praying that the land be partitioned equally between her and Clyde Scott. W. T. Moody was made a party defendant, and it was alleged that he claimed some interest in the premises. The answer of Clyde Scott admitted the allegations of the complaint, and joined in the prayer for relief. The answer of W. T. Moody alleges that, as the grantee of Nathan Scott, he is the owner in fee of the entire tract of land subject to plaintiff's ownership of a life estate in one-half of the land, and that the defendant, Clyde Scott, has no interest. The issues thus made depend upon the proper construction of the deed of Nathan Scott to Margaret Scott. W. T. Moody contends that the deed only conveyed a life estate to Margaret Scott and Laler Church, the only child of Margaret Scott and Nathan Scott, living at the date of the deed, while the plaintiff, Laler Church, and the defendant, Clyde Scott, contend that the deed conveyed a fee conditional special, and Margaret Scott having died without having made any disposition of the land, they take the entire estate. So, therefore, the only question for determination by the Court is the construction of the deed.

Under the construction contended for by W. T. Moody the grant would have to be construed as a grant to Margaret Scott and her children living at the date of the deed, while

under the construction contended for by Laler Church and Clyde Scott the words under consideration must be construed as if the grant had been to Margaret Scott and the heirs of her body begotten by her husband, Nathan Scott. This deed was evidently written by one wholly without experience in the drafting of legal instruments, and I feel sure there is no exact precedent by which the Court may be governed in the construction of the deed. In such a case it is the plain duty of the Court to so construe the deed as to give effect to the manifest intent, unless by so doing some rule of law will be violated. *Shaw v. Robinson*, 42 S. C. 345, 20 S. E. 161; *Duckett v. Butler*, 67 S. C. 130, 45 S. E. 137. When the entire deed and the situation of the parties are considered, I have no doubt that this instrument was intended to convey a fee conditional special to Margaret Scott.

The difficulty in this case seems to arise from the fact that Nathan Scott has apparently conveyed the premises to Margaret Scott and the heirs of his own body by Margaret Scott rather than to the heirs of the body of Margaret Scott by Nathan Scott. If the grant had been unto Margaret Scott and the heirs of her body by Nathan Scott, it most likely never would have been questioned that Margaret Scott took a fee conditional special. *Lipscomb v. Hammett*, 56 S. C. 549, 35 S. E. 194. Yet from a consideration of all parts of the deed and the situation of the parties, I think beyond doubt Nathan Scott intended to divest himself of all estate in the premises and to limit it to such heirs as Margaret Scott should have by him. The word heirs is so circumscribed in the deed as to make it plain in any event that no person could take under such designation who did not spring from the union of Margaret Scott and Nathan Scott, and since they were husband and wife no person could by any possibility be an heir of the body of Nathan Scott by Margaret Scott without also being an heir of the body of Margaret Scott by Nathan Scott. I think the anxiety of Nathan

REP.]

April Term, 1914.

Scott was, not so much to refrain from parting with the entire estate and from granting an estate in indefinite succession to Margaret Scott and the heirs of her body, as to be sure that the estate should be limited to such heirs of Margaret Scott as should be borne of his body, and when resort is had to the warranty it seems absolutely conclusive that such was his intention, for the warranty is to "Margaret Scott and *her heirs as above stated*." Of course the warranty cannot enlarge the estate granted, yet it is always permissible to consider the warranty for the purpose of ascertaining the intention. *Austin v. Hunter*, 85 S. C. 472, 67 S. E. 734.

Although awkwardly expressed, the intention is the important consideration. The warranty shows beyond a question the heirs described to Nathan Scott in the *habendum* were intended to be the heirs of Margaret Scott, provided only, that such heirs should spring from the body of Nathan Scott. Although not expressly in point, the situation in this case is well expressed by the Supreme Court of Missouri in the case of *Reed v. Lane*, 122 Mo. 311, 23 S. W. 957. In that case the deed was to "Martha May, and unto her heirs by the body of Silas May only, and assigns forever." In discussing the proper construction of this deed, which was held a fee tail, the Court said: "The objection is made that the words of procreation used in the deed are insufficient to create an estate tail, for the reason that the limitation is not to the heirs of the body of the grantee, Mrs. May, but to those of the body of Silas May. We do not think there is any force in the objection. While the words of limitation generally used are 'heirs of the body,' their use is not absolutely essential. Any other equivalent words or expression which clearly makes the limitation to the heirs of the body of the grantee will be sufficient. The intention of the parties is the primary object to be sought in the construction of such instruments."

It might make the meaning of the deed in this case plainer to read the word *the* as *her* in the expression "unto Margaret

Scott and the heirs of my body begotten in wedlock with my wife, Margaret Scott." In that case the grant would

- 1 be unto "Margaret Scott and her heirs of my body begotten in wedlock with my wife, Margaret Scott."

Although still an awkward expression, I think then there would be no doubt as to the proper construction. Such substitution of one word for another is perfectly permissible in order to effect the intention; see the case of *Sease v. Sease*, 64 S. C. 216, 41 S. E. 898, where the word *her* is changed to *their*.

There are also other features of the deed tending to support this construction. Nathan Scott warrants the premises to Margaret Scott and her heirs and assigns, which would seem to indicate that some interest conveyed to Mar-

2 garet Scott should exist after her death, yet the contention of W. T. Moody would limit her to a life estate. There is also no warranty to any heirs except the heirs of Margaret Scott, indicating that no person was expected to take with her as a tenant in common. Also if there had been an intention to convey to Margaret Scott and her daughter, the plaintiff, it would have been more natural to call her by name in the deed. He had only one child, the plaintiff, and if the writer of the deed, especially one inexperienced in writing deeds, had intended to thereby convey an interest to this child, I think it would have been most natural for him to have called her by name rather than by the indefinite term *heirs of the body*. Also at the date of this deed Nathan Scott had only one child, and it would be unusual for him to refer to her in the plural as *heirs*.

Such words as *heirs*, *heirs of the body*, *issue* and *issue of the body* have frequently been construed to mean child or children, when from the context it was evident that the words were used in that sense, but they have never been so construed where it was plain they were not used in that sense. I have carefully examined the following cases, in which technical words of limitation have been construed to

REF.]

April Term, 1914.

mean children: *Holeman v. Fort*, 3 Strob. Eq., 22 S. C. Eq. 156; *Bailey v. Patterson*, 3 Rich. Eq. 156, 24 S. C. Eq.; *Moone v. Henderson*, 4 Des. Eq., 4 S. C. Eq. 458; *McCown v. King*, 23 S. C. 238; *Hayne v. Irvine*, 25 S. C. 289; *Lott v. Thompson*, 36 S. C. 38, 15 S. E. 278; *Shaw v. Robinson*, 42 S. C. 342, 20 S. E. 161; *Ducket v. Butler*, 67 S. C. 130, 45 S. E. 137; *Reeves v. Cook*, 71 S. C. 275, 51 S. E. 93; *Rembert v. Evans*, 86 S. C. 445, 68 S. E. 659; *Rowe v. Moore*, 89 S. C. 561, 72 S. E. 468; *Guy v. Osborne*, 91 S. C. 291, 74 S. E. 617; *Porter v. Lancaster*, 91 S. C. 300, 74 S. E. 374. In all of these cases it was manifest from the face of the instrument that the words of limitation were not used in their technical sense, and that the parties intended to use them in the sense of children, but I do not think these cases applicable to the case at bar for the reason that it is evident from the face of the instrument and the situation of the parties that the words of limitation were not used in the sense of children. Words of limitation should be given their technical meaning, unless a different meaning is required by the context, and they certainly should not be construed to mean children when all the evidence indicates they were not used in that sense. What I conceive to be the true rule is thus stated in the case of *Dixon v. Pendleton*, 90 S. C. 12, 72 S. E. 501: "The words, child, son, daughter, are the common words in which men think of their immediate offspring, and when the word issue is used either in thought or in expression, it almost invariably denotes an intention to include not only children, but other lineal descendants. Hence issue should not be held to mean children unless the context clearly indicates that restricted meaning."

If the evidence of intention were even more doubtful than it is, the doubt should be settled against the contention of W. T. Moody. Under his construction of the deed Nathan T. Scott retained the reversion in the premises after the expiration of the life estate, while under the construction of Laler Church and Clyde Scott he parted with the entire estate. It

is a universally accepted rule that a deed is to be construed rather against the grantor than in his favor. If an

3 ambiguous expression should be used with no evidence whatever to indicate the intention, the Court would incline to a construction against the interest of the grantor rather than to a construction in favor of his interest. *Peay v. Briggs*, 2 Mill, 9 S. C. L. 98.

I am clearly of the opinion that the deed in this case conveyed a fee conditional to Margaret Scott, limited to a particular class of heirs of her body, namely, to those begotten in wedlock with her husband, Nathan Scott.

It is therefore ordered, adjudged and decreed, that Laler Church and Clyde Scott are the owners of the premises described in the complaint as tenants in common in equal proportions, and that W. T. Moody has no interest therein.

It is further ordered, adjudged and decreed, that a writ of partition in the usual form do issue as provided by law. T. H. Spain, Judge of the Fourth Circuit. At chambers at Darlington, S. C.

The deed in question, and construed in the decree, was as follows:

“The State of South Carolina, County of Marion.

Know all men by these presents that I, Nathan T. Scott, in the State aforesaid, county of Marion, in consideration of the sum of ten dollars and other valuable consideration to me paid by Margaret Scott in the State aforesaid, Marion county, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Margaret Scott and the heirs of my body begotten in wedlock with my wife, Margaret Scott, a certain tract of land, containing sixty acres, situate on southwest side of Bear Swamp, Marion county, S. C., bounded north by Owens land, east by land of Frank Elvington, south by land of W. H. Breeden and John L. Scott, west by land of Redding Owens' estate, said land is shown by a compiled plat

REF.]

April Term, 1914.

made December 17th, 1890, by E. D. Carmichael, surveyor; together with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining. To have and to hold all and singular, the said premises before mentioned unto the said Margaret Scott and the heirs of my body begotten in wedlock with my wife, Margaret Scott. And I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said Margaret Scott and her heirs as above stated and her heirs and assigns against myself and my heirs and against every person lawfully claiming or to claim the same or any part thereof. Witness my hand and seal this the 12th day of November, in the year of our Lord one thousand eight hundred and ninety-two and in the one hundred and sixteenth year of the sovereignty and independence of the United States of America. N. T. Scott (L. S.). Signed, sealed and delivered in the presence of (all interlinings before signing) F. C. Rogers, E. D. Carmichael."

The defendant, Moody, appealed on the following grounds and exceptions:

I. Because his Honor erred, it is respectfully submitted, in holding "that the deed in this case conveyed a fee conditional to Margaret Scott, limited to a particular class of heirs of her body, namely, to those begotten in wedlock with her husband, Nathan Scott."

II. In holding that Laler Church and Clyde Scott are the owners of the premises described in the complaint as tenants in common in equal proportions, and that W. T. Moody has no interest therein.

III. In not holding that the deed in question conveyed a life estate to Margaret Scott and Laler Church, with remainder to N. T. Scott, and that Margaret Scott having died before N. T. Scott conveyed to W. T. Moody, W. T. Moody owns one-half of said lands in fee and Laler Church has a

life estate in the remaining one-half with remainder to W. T. Moody.

Mr. James W. Johnson, for appellant, cites: 71 S. C. 276; and distinguishes same. *Limitation is not to heirs of the first taker*: 42 S. C. 342; 67 S. C. 135; 23 S. C. 232; 86 S. C. 445, 450. *The case in 91 S. C. 300 is decisive of this case. Only child in esse at date of deed took thereunder*: 3 Strob. 66; and *only a life estate*: 94 S. C. 349; 85 S. C. 296. *"The heirs of my body begotten in wedlock with my wife" mean children*: 67 S. C. 135. *Resort to warranty to ascertain intention*: 85 S. C. 472, practically overruled; 94 S. C. 349. *Value of life estate in half of land*: 53 S. C. 356.

Messrs. W. F. Stackhouse, for plaintiff-respondent, and *A. F. Woods*, for Scott, defendant-respondent, cite: *Intention to be ascertained*: 42 S. C. 345; 67 S. C. 130; 3 Strob. Eq. 156; 3 Bailey Eq. 156; 4 DeSaus. 458; 23 S. C. 238; 25 S. C. 289; 36 S. C. 38; 42 S. C. 342; 71 S. C. 275; 86 S. C. 445; 91 S. C. 291; 89 S. C. 561; 91 S. C. 300; 47 S. C. 288; 76 S. C. 484; 83 S. C. 265; 90 S. C. 12; 6 Rich. Eq. 92; 28 S. C. 238. *Construction least favorable to grantor*: Devlin Deeds, sec. 848; 1 Strob. 143; 2 *Ib.* 156; 2 Mills 98. *True construction*: Blackstone Comm. 114; 56 S. C. 549.

July 17, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

This was an action for partition, in which the appellant, Moody, was made a party, because it was alleged he claimed some interest. Moody did claim one-half interest in fee and the other half in remainder. The rights of the appellant depend upon the construction of the deed of N. S. Scott to Margaret Scott.

REP.]

April Term, 1914.

The case was heard before Judge Spain. The decree of Judge Spain is affirmed, for the reason therein set forth; and for the additional reason that when this deed is construed in the light of the warranty, as in *Austin v. Hunter*, 85 1, 2 S. C. 472, 67 S. E. 734, not for the purpose of enlarging the estate conveyed, but to explain its meaning, it is manifest that the word "my" in the *habendum* means "her."

The appellant says that the construction of the parties themselves should have weight, and the grantor, after the death of the grantee, conveyed the land to the appellant.

4, 5 The construction of the grantor after the execution of this deed is immaterial. The construction of the grantee in the subsequent deed, who is the appellant here, may be material. The record contains the following statement:

"That a portion of the purchase price of \$1,750.00, above referred to, was represented by certain real estate which was conveyed by said W. T. Moody to the said Nathan T. Scott in exchange for the lands in question, and that subsequent to the commencement of this action the said Nathan T. Scott reconveyed the said lands to the said W. T. Moody and also returned to him a portion of the cash represented in said purchase price." The appellant can't have both. Let the decree of Judge Spain and the deed therein referred to be reported.

The judgment appealed from is affirmed.

8897

PADGETT v. NORTH CAROLINA HOME INS. CO.

(82 S. E. 409.)

FIRE INSURANCE. PROOF OF LOSS. EVIDENCE.

1. The proof of loss need only conform substantially to terms of policy. Where insured furnished insurer with a sworn statement which set out the circumstances of the fire in question, and the insurer acted thereon without demand for any further or more particular "proof of loss," it waived any defects in the proof of loss furnished.
2. The sworn statement furnished the insurer by the insured in this case, stating the circumstances of the fire, as fully as they could be stated after a total destruction of the property insured, held, a sufficient compliance with the requirements of the policy.
3. The proof of loss furnished the insurer under stipulations in policy is not admissible as proof in Court. But the testimony in Court may refer to data stated in the application or policy at the time the contract of insurance was made.
4. Where a wife holding the legal title to land in fee, undertook to convey same to her husband by an unwitnessed deed, the husband thereby acquired an equitable interest in fee; and the outstanding legal title in the wife was not a breach of the warranty of title in husband as insured.
5. The execution of a deed may be proven by its production, and proof of the grantor's signature or her acknowledgment that she had executed it.
6. Where the insurer or its agent has knowledge that a gin had been erected only about two months, and had shut down because of a defective engine, and was not being operated, when it wrote the policy of insurance, it thereby waived the express warranty in application for insurance, "that the property has been profitable, and the assured has every reason to believe that it will so continue."
7. The answer "owner," written in an application on behalf of the insured for insurance, by the agent of insurer, who then knew the gin in question had been shut down because of a defective engine, and was idle, to the question, "is the gin operated by owner, manager or tenant?" is not a warranty by assured that it is being then operated. But if a warranty was waived by the insurer's agent writing the policy with knowledge of the existing facts.

Before WILSON, J., Saluda, December, 1913. Affirmed.

Action on a fire insurance policy, brought by W. D. Padgett and Gullett Gin Company against North Carolina

REP.]

April Term, 1914.

Home Insurance Company. From a judgment for plaintiffs, defendant appeals. The facts are stated in the opinion. The provisions of the policy as to proof of loss were as follows:

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify."

The statement of loss sent the company was as follows:

STATEMENT AND PROOF OF LOSS BY FIRE.

South Carolina, Saluda County.

To the North Carolina Home Insurance Company of Raleigh, N. C.:

You will take notice that the property described in your policy, No. 513508, was totally destroyed by fire about three o'clock of the morning of January 1st, 1913, the cause and origin of said fire being unknown to this deponent. The ownership and location of said property were as stated in said policy. The cash value thereof, the whole insurance and loss thereon, together with the insurance by and the claim upon you are as follows: Description of property—one frame wooden building as described in policy and one Gullett Gin System and Fixtures, 3 stand built and constructed by Gullett Gin Co., as described in policy, whole property having cash value of three thousand dollars and whole insurance in your company twenty-two hundred and fifty dollars and the whole of said property was destroyed and there was a total loss and the claim upon the insurance company, said The North Carolina Home Insurance Company of Raleigh N. C., is the sum of twenty-two hundred and fifty dollars, and the only encumbrance on the said property was a mortgage in favor of Gullett Gin Co., and there was no other insurance on the said property; the building referred to in said policy was occupied only as permitted therein, and said fire did not originate by any act, design, or procurement on the part of the insured or prohibited in said policy; and nothing has been done before or since the fire by said insured to violate any of the conditions of the said policy. There has been no change in the title, use, occupation, location, possession or exposures of said property since the issuing the said policy, and this claim and proof and notice is made pursuant to the terms of said policy. That all conditions and terms of policy have been complied with by undersigned, and facts set out in policy are hereby

REP.]

April Term, 1914.

adopted, and any fuller or further proof will be furnished on notice or demand. W. D. Padgett.

"Sworn to and subscribed before me the 21st day of January, 1913. C. J. Ramage, Notary Public for S. C. (Seal)."

The defendant's exceptions were as follows:

1. "It was an error in his Honor to allow the plaintiff to testify over the objection of the defendant as to the aggregate value of the machinery and personal property destroyed by the fire. The error being:

(a) "The contract of insurance provides how the proof of loss shall be made up, and that the particular items destroyed by the fire, and covered by the policy and the cash value of each article destroyed shall be proven.

2. "The presiding Judge erred in admitting in evidence the paper marked exhibit 'B,' purporting to be a proof of loss. The error being:

(a) "The contract of insurance provides the manner in which the proof of loss shall be made up, among other things provides that it shall state the several articles and the cash value of each item thereof and the amount of the loss thereon, and the paper introduced in evidence does not purport to do this.

3. "It was error in his Honor to allow the deed marked exhibit 'E' to be introduced in evidence without first examining the subscribing witnesses thereto. The error being:

(a) "The only method by which a deed can be proven is by the subscribing witnesses, if they are alive and within the jurisdiction of the Court.

(b) "It does not appear that the subscribing witnesses were either dead or without the jurisdiction of the Court, but on the other hand it appears that they were alive and were within Saluda county.

4. "It was error to allow the witness, W. D. Padgett, to testify as to the interest which he held under the purported

deed, and to explain the manner in which the deed was made. The error being:

(a) "The deed itself was the highest evidence as to the character of the title held.

(b) "The testimony shows that the deed was not executed until after the fire, and the testimony as to the holding of the plaintiff under the deed prior to the fire was in conflict and contradictory of the paper itself and plaintiff's proof as to when it was executed.

(c) "The plaintiff should not have been allowed to attack and explain his own title and the conveyance under which he was holding.

5. "It was error in his Honor to allow the plaintiff and the witness, Merchant, to testify that the agent of the company knew that the machinery was idle when he wrote the policy of insurance. The error being:

(a) "That by his written application to the company, the plaintiff represented that the machinery was running, and he should not be allowed to contradict his written representation on which the policy was issued.

(b) "The testimony shows that the policy written at the time spoken of by the plaintiff and the witness, Merchant, was a policy in another company than the defendant and was cancelled because the machinery was not in operation, and the defendant could not be bound by the acts of the agent while representing some other company.

(c) "Plaintiff ought not to be allowed to falsify his written representation on which the policy was issued, and his warranty contained in the policy of insurance.

6. "It was error in the presiding Judge to allow the plaintiff to testify that the deed was signed on the 26th day of October, the error being:

(a) "The testimony contradicts the writing itself, in that the deed bears date August 27th.

REF.]

April Term, 1914.

(b) "The testimony contradicts plaintiff's own testimony showing that the deed was really executed sometime after the fire.

(c) "Plaintiff should not be allowed to attack the title under which he holds, or explain the execution of it.

7. "It was error in his Honor to refuse to direct a verdict in favor of the plaintiff on the first ground on which the motion was made, to wit:

1. "'As to the personal property, there is no testimony tending to show the loss in the manner provided by the policy. The policy provides this: The cash value of each item thereof, and the amount of loss thereon; all encumbrances thereon shall be proved. There is no testimony tending to show the separate items of the personal property destroyed by the fire, and we submit that there is a total failure of proof in this particular as required by the contract, to wit, the policy of insurance.' The error being:

(a) "The contract of insurance on which plaintiff's right to recover is based, provides that the proof of loss shall state the particular items of property destroyed and the cash value of each item thereof, and in proving the said loss the plaintiff was required, under the terms of the contract, to show the several items of property destroyed and the cash value thereof, and there was a total failure of testimony along this line.

(b) "The testimony of plaintiff, and all of the witnesses who testified thereon, was as to the aggregate value of the machinery, and there was no testimony to show what particular machines were destroyed by fire nor the cash value thereof.

8. "It was error in his Honor to refuse to direct a verdict for the defendant on the second ground on which the said motion was made, to wit:

2. "The testimony shows that the land on which the building was located was not at the time of the fire vested in fee simple in the insured, Padgett, as required by the

terms of the policy, and in the warranty and in his written application for insurance by the plaintiff to whom the policy was issued, and as contained in the policy itself.' The error being:

(a) "The undisputed testimony shows that the title under which Padgett held the lands was executed after the fire and the title to the said property did not vest, under the said conveyance, in the said Padgett until after it was destroyed by the fire.

9. "It was error in his Honor to refuse to direct a verdict for the defendant on the third ground on which the said motion was made, to wit:

3. "The testimony shows, and from which there can only be one inference drawn, that there has been a breach of warranty, and thereby renders the policy of insurance null and void, in (a) it appears from the testimony that the property was idle property and was not operated; (b) that it was not profitable; (c) that the title to the property was not in the assured, and there is no competent testimony tending to establish waiver of these conditions or warranties.' The error being:

(a) "The undisputed testimony shows that the plaintiff represented in writing to the defendant at the time the policy was issued that it was running and was not idle, when, in fact, the said property was idle and had not been running for some time.

(b) "The policy warrants that the property was in use and operation, and the undisputed testimony shows that the said property was not in use and in operation, but was idle.

(c) "The written application on which the policy was based shows that the property was profitable, and the undisputed testimony is that the said property was not profitable, but was idle and could not be used and plaintiff had no intention of using the same.

(d) "The policy warrants that the property was profitable, and the undisputed testimony is that the said property

REP.]

April Term, 1914.

was not profitable, but was idle, and plaintiff had no intention of using the same.

(e) "That the written application on which the policy was based represents that the title to the said property was vested in fee simple in the said W. D. Padgett, and the undisputed testimony is that the said property was not so vested in the said Padgett.

(f) "The policy warrants that the title to the property was vested in the said W. D. Padgett in fee simple, and the undisputed testimony is that the title to the said property was not so vested in the said W. D. Padgett.

(g) "There was no competent testimony upon which the jury should have been allowed to pass as to the waiver of these written representations on the part of the plaintiff and the warranties contained in the said policy.

10. "It was error in his Honor to refuse to strike out the testimony of the witness, Padgett, undertaking to relate a conversation with Crymes, the alleged agent of the company, prior to the time this application was made and prior to the time the policy was written, the error being:

(a) "The conversation was inconsistent with and contradictory of the written application on which the policy of insurance was issued.

(b) "It contradicts and varies the terms of a written instrument, to wit, the application on which the policy was based.

(c) "The conversation relates to a time when the defendant, Crymes, was representing another company, and this defendant had no relation to the conversation and was not bound by the statements of the said Crymes as made while acting as agent of some other company.

11. It was error in his Honor to refuse to strike out the testimony of the witness, Merchant, detailing a conversation with the said Crymes, the error being:

(a) "The said conversation varies and contradicts the terms of the written application on which the policy of insurance was issued.

(b) "The conversation between Crymes and Merchant was as the agent of the Greensboro Insurance Company, and he was not then representing this defendant, or transacting any business for it, and this defendant ought not to be held liable on statements made by him, acting for some other company than it.

12. "It was error in his Honor to refuse to direct a verdict on the ground that no proof of loss was filed with the company, as required by the terms of the policy, the error being:

(a) "That the contract of insurance provides that a proof of loss shall be submitted to it, showing the particular items of property destroyed and the cash values of each item and the paper purporting to be a proof of loss does not undertake to show the particular items of personal property destroyed, nor the cash values thereof.

(b) "There was no testimony to show any waiver of this condition of the policy.

13. "The presiding Judge erred in charging the jury as follows:

"I also charge you that when an insurance policy, which is a contract, is entered into, that certain conditions in that policy, under certain circumstances, can be waived by the company or its duly authorized agent, notwithstanding the wording of the policy. It may say that you must do that or must not do that; if the authorized agent changes that in the scope of his authority, that is, in soliciting insurance and getting insurance contracts, if he does that in the scope of his authority, while acting for the company, why then the company is bound by his acts. I charge you that, and even where certain conditions in an insurance contract are to be fulfilled, if the company, by its agents (and when I say by its agents, through its agents) waives those conditions,

REP.]

April Term, 1914.

why the contract is gone,' and, in connection therewith, in charging the sixth request of the plaintiff, which is as follows:

6. "Knowledge of an insurance agent acting in the scope of his duties is notice to the company. That means this, that you have an agent employed to do a certain thing, you send him to do a certain thing, while he is acting in the scope of his duties he is your agent, your representative; when he goes beyond that, when he goes to do something you did not send him out to do, that is not within the scope of his duties, different from which you sent him out to do, then you are not bound, but when he is acting in the scope, or apparent scope of his duty, why he binds you," the error being:

(a) "There was absolutely no testimony in the case showing, or tending to show, any waiver of the terms and conditions and warranties contained in the said policy and in the application upon which the policy was based.

(b) "All of the conversations and acts of the agent of the insurance company, relied upon to show waiver in this case, occurred before the issuing of the policy, and all such conversations, acts and knowledge were merged in the written contract and cannot be taken advantage of to show waiver.

(c) "The charge had no application whatever to the facts of the case and allowed the jury to find that the conditions of the policy had been waived upon testimony which was not sufficient to support a waiver.

(d) "The conversations were with the agent while representing another company, and not while representing this defendant, and the statements and acts of the said agent could in nowise be held to be the statements or acts of this defendant.

14. "It was error in his Honor to charge the jury plaintiff's first request, which is as follows, to wit:

1. "That if an insurance company refuses to pay a loss under a policy issued by it, and denies liability on such policy upon the ground that the policy was forfeited for other reasons, this would be evidence for the jury to consider of the question of waiver of formal proofs of loss. I charge you that;' the error being:

(a) "There was absolutely no testimony in the case to show that the defendant had denied liability on the policy upon any ground whatever.

(b) "The only testimony tending to show why the defendant refused to adjust the loss is that the plaintiff refused to sign a nonwaiver agreement whereby the defendant could adjust the loss without waiving any of its rights.

(c) "Under the charge the jury were allowed to take into consideration the reasons set forth in defendant's answer for the denial of liability, and it was thereby deprived of its defense that proof of loss had not been filed in accordance with the terms of the policy.

15. "It was error in his Honor to charge plaintiff's second request that an equitable title gives an insurable interest in property, the error being:

(a) "The contract in this case provides that the insured shall have a fee simple title and not an equitable title.

(b) "The insured warranted his title to be that of a fee and not an equitable title.

16. "The presiding Judge erred in charging plaintiff's fifth request, as follows, to wit:

5. "This policy contains a great many stipulations, the breach of any of which would forfeit the policy, but the company may waive the forfeiture and thereby make the policy a good and valid policy, although the insured has violated some of its provisions which work a forfeiture, and the question of waiver is one for the jury. I charge you that;' the error being:

(a) "There is absolutely no testimony which shows or tends to show that the defendant waived any of the pro-

Rep.]

April Term, 1914.

visions, conditions and warranties contained in the said policy.

(b) "All of the testimony upon which the plaintiff relies to show waiver was before the writing of the policy, and all such conversations are and were merged in the contract of insurance.

(c) "The conditions and warranties upon which the defendant relied were based upon representations made by the plaintiff, in writing, to the defendant, and, for that reason, would not be the subject of waiver by any act of its agent prior to the issuing of the policy, and could only be waived by some act of the agent after the writing of the policy.

17. "The presiding Judge erred in refusing to charge defendant's second request to charge, which was as follows, to wit:

2. "The Court is requested to charge that under the terms of the policy in this case the machinery is only insured while in use, and the undisputed testimony shows that the personal property was not in use, therefore is not covered by this contract of insurance, and as to the personal property mentioned in the contract you must find for the defendant; the error being:

(a) "The contract of insurance insures the machinery 'in use' and does not undertake to insure the machinery while not in use, and the undisputed testimony in this case shows that the said machinery was not in use at the time the fire occurred, but had been idle for some time previous thereto and was not covered by the contract of insurance.

(b) "At the time of the fire the policy of insurance did not cover the machinery in question, for the reason that the said machinery was idle, and under the express terms of the contract it is only insured while in use."

Messrs. Grier, Park & Nicholson, for appellant, submit: Admission of testimony. Method of proof of loss pre-

scribed in policy exclusive: 7 Enc. Ev. 561; 19 Cyc. 945. *Paper furnished as proof of loss was an incompetent ex parte statement by insured:* 56 Am. Rep. 637; 7 Enc. Ev. 573. *Waiver based on knowledge and acts of agent:* 36 S. C. 213; 48 S. C. 224; 52 S. C. 225, *distinguished*. Cites: 77 S. C. 187; 83 S. C. 236; 84 S. C. 95; 88 S. C. 31. *Agent acting fraudulently in collusion with insured:* 50 S. C. 259; 77 S. C. 99. *Charge as to waiver:* 77 S. C. 187; 83 S. C. 236; 84 S. C. 95.

Messrs. Thurmond & Ramage and B. W. Crouch, for respondent: *Sufficiency of proof of loss:* 19 Cyc. 850. *Proof of deed:* 29 S. C. 170; 37 S. C. 102. *Proof of consideration of deed:* 35 S. C. 537. *Deed created equitable title:* 34 S. C. 416. *Vendee may prove execution:* 33 S. C. 241; 36 S. C. 608. *Title may be shown by parol testimony:* 36 S. C. 264. *Date of deed immaterial:* 35 S. C. 537. *Circumstances leading to execution of deed may be shown by parol:* 57 S. C. 60; 66 S. C. 68; 68 S. C. 527. *Defendant knew machinery was idle when it wrote policy:* 36 S. C. 264; 79 S. C. 526. *Notice to Crymes as agent:* 79 S. C. 526; 88 S. C. 37; 96 S. C. 187. *Retention of premiums with knowledge of circumstances:* 56 S. C. 508; 61 S. C. 448; 63 S. C. 297. *Waiver of defects in proof of loss by refusal to pay:* 29 S. C. 579; 70 S. C. 295. *Padgett's equitable interest was insurable:* 23 S. C. 197; 19 Cyc. 584, 692; 64 S. C. 413; 96 Am. Dec. 582; 76 Am. Dec. 581; 71 Am. Dec. 536. *Warranty not implied:* 22 Am. Dec. 571. *Warranty as to title not broken:* Kerr Ins., p. 331; 31 Oregon 41; 117 Pa. St. 460; 33 L. R. A. 258. *Crymes agency for defendant:* Civil Code, secs. 2711 & 2712; 16 Am. & Eng. Enc. of L. 908, 992; 1 May. Ins., sec. 70a; 57 S. C. 358; 60 S. C. 486; 80 S. C. 292; 19 Cyc. 781; 69 Am. St. Rep. 201; 76 Am. St. Rep. 111; 67 S. C. 399. *Waiver:* 36 S. C. 213; 16 L. R. A. 33; 70 S. C. 82; 57 S. C. 358; 143 U. S. 496; 55 S. C. 6; 67 S. C. 399; 51 S. C.

REP.]

April Term, 1914.

180; 37 S. C. 417; 57 S. C. 16; 54 S. C. 599; 14 A. & E. Ann. Cases 89; 63 S. C. 192; 25 L. R. A. (N. S.) 1, note; 80 S. C. 392; 143 U. S. 496; 51 S. C. 540; note 107 Am. St. Rep. 130; 70 S. C. 295; 48 S. C. 195; 79 S. C. 526; 81 S. C. 152; 74 S. C. 246.

July 17, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

Action upon a fire policy of insurance. The property insured was a gin and house. The loss was total, building and machinery. The plaintiffs had a verdict for the full amount stipulated in the policy, which was \$2,355.00.

The defendant appeals, and assigns seventeen errors. Of these six about the admission of incompetent testimony; two about the refusal to strike out testimony; four about a refusal to direct a verdict; five about the charge and the refusal to charge.

In our judgment, all the exceptions are without merit. The appellant has presented the case under three heads: (1) the admission of testimony; (2) the direction of a verdict, and (3) the charge; and this opinion will adopt that procedure, though not that order.

But, prior to such consideration, the setting of the case is best manifested by a history of the transaction.

The plaintiff, Padgett, is 55 years old, and never had a suit at law before this; he had purchased the gin plant on a credit, and the real solicitors of the insurance were the Gullet Gin Co., which had a \$1,500.00 mortgage on the plant, and one Crymes, who sought the business as agent. It was stated at the bar that Crymes is a good man. Two companies had theretofore issued policies of insurance on the plant and then cancelled them. The second of these policies was secured and written by Crymes, the same who wrote the third, that is now in issue.

Before the policy had been written the land upon which the house and machinery stood had belonged to W. D. Padgett's wife; but before the policy was issued she conveyed the same to him, by what is, in legal effect, and was, an unwitnessed deed, and this to conform to a rule of the company that the insured must own the property embraced in a policy.

The defendant insured a house and machinery therein against loss by fire; it got and retains the premium which was paid therefor; its agent knew when the policy was written that the house was at the time idle and unoccupied; its agent also knew that one or more policies upon the property had been cancelled aforetime; the good faith of the agent and of the insured is not impugned by pleading or testimony; the house was erected in the summer of 1912; the machinery then installed; the policy was written 29th October, 1912; the fire occurred 1st January, 1913, and the destruction was total.

The law suit is to determine the rights of the parties; the insured demands to be paid; the insurer declines to pay.

The errors charged fall around the defenses plead, and may be best considered in connection with the defenses. The defenses are: (1) failure of Padgett to make proper proof of loss; (2) title warranted to be in Padgett; (3) property warranted to be in active operation; (5) Padgett misrepresented that insurance on the property had been declined only by one company other than defendant.

As to "proof of loss;" technical "proof of loss" is not proof in Court of the loss.

The first is for the benefit of the company, and the duty to make it arises out of the terms of the policy; the second is for the benefit of the jury, and is made before the jury pursuant to the rules of evidence to prove a liability under the policy; and it exists independently of the technical "proof of loss."

REP.]

April Term, 1914.

In the very nature of the case, "the proof of loss" must only substantially conform to the requirements of the policy.

The real issue about that is, has the insured informed

1 the insurer of the fire and all the particulars of it?

That is what the insured here agreed to do.

The particular words of the policy thereabout ought to be reported.

On 21st January, 1913, twenty days after the fire, the insured made and swore to a statement which set out the circumstances of the fire. That statement ought to be reported. A copy of it was sent to the company, and the receipt of it was not denied.

The company thereafter sent a Mr. Cothran to the locus, and he talked with the insured about the fire; he desired the insured to sign a paper, which the insured declined to do, and there was no demand by Mr. Cothran, or by the company, for any further or more particular "proof of loss."

The interest both of the insurer and the insured, and that includes the interest of the public, would have been subserved by a suggestion from the company to Padgett that his "proof of loss" was not so full and exact as was required by the policy. And the failure to make such suggestion was a waiver of any right to have it. *Madden v. Ins. Co.*, 70 S. C. 295, 49 S. E. 855.

But the "proof of loss" that was supplied was a reasonably full and exact compliance with the general
2 words of the agreement to make it, under the circumstances of the case. There were no particulars to report; the conflagration was the entirety.

Akin to "proof of loss" was the loss proven at the trial by the witnesses.

The defendant has excepted to the character of that proof.

As is well contended by appellant, the "proof of
3 loss" made to the company does not stand for proof in Court.

But Crymes, speaking for his principal, answered in the application that he "considered the values as stated in the application to be correct," and he "fully recommended the risk as free from all financial hazard;" that the "premises were clean and in good condition."

The witness, Merchant, testified that he and Crymes went to the ginhouse and listed the property and looked at it.

The witness, Padgett, testified that all the property there listed was totally destroyed by fire. The complaint alleges total destruction of it, and the answer admitted it.

There was competent proof of the existence of the property, piece by piece, and the total destruction of it.

The appellant's second contention, that the policy must run to the real owner of the thing insured, is true.

The policy stipulated that the assured was the sole owner in fee of the land upon which the outfit stood.

The fact is, that the land once belonged in fee to the wife, but she had conveyed it to her husband before the policy was written, by what, in effect, was an unwitnessed

4 deed, for the witness signed after delivery and after the fire, and upon acknowledgment by the wife that she had signed the deed aforetime.

Had the wife conveyed to the husband the land, by a properly phrased deed to carry the fee, except it was not witnessed, that would constitute the husband the equitable owner of the fee, an interest fully capable of insurance, and as good for this, and many purposes, as a legal fee. The case is not altered that the deed was improperly witnessed.

It is not incumbent to cite authority for this statement of the law, for it is elementary.

As far as the witnesses were able to do, amidst the objection of counsel, they proved the signing by the wife;

5 and about that there is no real ground to doubt even.

About the third defense, the warranty of profitableness, there was such a warranty. The language is, "That the

REF.]

April Term, 1914.

property had been profitable, and the assured has every reason to believe that it will so continue."

But Crymes, the agent, directly, and the company, through the statement in the application, knew the outfit was put up in August, 1912, that it was insured the 29th October, 1912, and that there was then no chance to say it had been

6 profitable. The insurer knew all about that matter that the insured could know. There could be no profit without operation, and there had practically been no operation.

Upon the issue of whether the insured did warrant that the gin was in actual operation when insured, the
7 appellant hardly quotes correctly the answer of the insured thereabout.

The question was: "Is the gin operated by owner, manager or tenant?"

The answer was: "Owner."

Was the question framed to find out if the gin was idle or going, or was it framed to find out if it was worked by its owner or by a tenant?

In the application of the Dixie Insurance Co., the question was: "Will the gin be operated this season?" And the answer to that was: "Stopped, as gasoline engine * * * is defective."

The question in the first case stated is not sufficiently definite to convict the insurer of making an untrue answer to it; or to constitute it as a guarantee that on October 20th, 1912, the gin was then being operated.

More than this, the answer was written by Crymes, the agent, and he knew the fact. If anybody was guilty of misrepresentations it was Crymes. But the answer did not plead misrepresentation; the Court charged the jury upon the effect of it, though it was not in the case; and Crymes, who knew the facts, was not sworn.

The argument here is, that Crymes and Padgett, in effect, committed a fraud on the company, and that the case thus

falls under *Knoblock v. Germania Sav. Bank*, 50 S. C. 259, 27 S. E. 962.

There is not a scintilla of testimony to sustain the charge of fraud.

The fifth defense has not been argued, and must be considered abandoned.

The judgment below is affirmed.

8898

THORNTON v. SPARTAN MILLS.

(82 S. E. 414.)

MASTER AND SERVANT. ASSUMPTION OF RISKS. CHARGE. TRIAL. INSPECTION BY JURY.

1. An incidental remark in connection with charge on assumption of risks, "that does not mean the person assumes the risks of negligence" cannot reasonably be supposed to have affected the verdict, where the law with reference to that defense was fully covered in the general charge, and special instructions given on request of appellant.
2. It is not to be reasonably supposed that a reference to the policy of Congress as to the doctrine of contributory negligence affected the verdict, where the jury were instructed that they were bound by the law of this State, and if the evidence proved that plaintiff was guilty of contributory negligence, she could not recover.
3. The refusal of a motion to permit a jury to leave the courthouse, and to inspect the locus where an injury occurred is within the discretion of the trial Judge, and no abuse of discretion is shown in this case.

Before MEMMINGER, J., Spartanburg, March, 1913.
Affirmed.

Action by Josie Thornton against Spartan Mills. From judgment for plaintiff, defendant appeals. The charge of the Circuit Judge was as follows:

FOOTNOTE.—See note upon the allowance of a view by the jury in the discretion of the Judge. 42 L. R. A. 368.

REF.]

April Term, 1914.

Now, Mr. Foreman and gentlemen of the jury, this investigation between Josie Thornton, known as the plaintiff in this case, and the Spartan Mills, known as the defendant, has occupied a great deal of the time of the Court, and it has been a very thorough investigation; you gentlemen have listened patiently to all of the evidence, and you have had the benefit of hearing a great deal of speaking from the lawyers, all of which has been entertaining and no doubt very instructive to you.

Now, under our system of administering justice you have from the Judge no statement or expression of opinion, in any way, shape or form, upon the facts, that being entirely for you; because the Constitution says that Judges shall not charge juries in respect to matters of fact, but shall declare the law. Now, the points of law involved in this controversy are very simple and plain and easily understood, and can be and will be stated to you in a very short period of time; it being so that the Judges going all over the State and trying cases in which these same questions arise become accustomed to state them to the juries in a very brief form, the subjects themselves not being capable of any great variety of statement.

You have this girl claiming against the Spartan Mills actual damages for injuries she claims she received at the Spartan Mill, and she claims that they were inflicted on her by reason of negligence on the part of the Spartan Mill; and she specified in her complaint, as the law requires her to do, what acts she charges on the part of the Spartan Mill as being negligent on their part, and you have heard them repeatedly stated, and you will find them stated in the complaint, which you will take to your jury room, and upon which you will write your verdict. The charges are, in not having the place sufficiently lighted where she was called upon and did have to work, and therefore, by reason of insufficient light, she was not furnished with a reasonably safe place in which to work. And then, as

another specification, she claims that there was a danger there in the place where she had to work and of which she was not warned, and she claims she ought to have been warned. And another specification, which is not, however, insisted upon to any great extent, that she had to sit in an awkward position to do the work, the floor being slippery, and so forth, so that she was subjected to danger by reason of the place being not reasonably safe for working on that account.

Now, the question is there whether or not any of those things have been made out by the greater weight or preponderance of the evidence, and, if so, is that negligence on the part of the mill? Now, the Judge can't tell you what state of facts would constitute negligence on the part of the mill, but the Judge can tell you, and does tell you, that negligence is the failure to exercise due care, it being for the jury to say in the particular case what would constitute due care. Another definition of negligence is the doing of something which a reasonably prudent person would not have done, or failing to do something which a reasonably prudent person would have done.

Now, the law requires the mill, the employer here of this plaintiff, to exercise that due care, and it says that the failure to exercise due care is negligence, and that if injury results as a proximate cause from that negligence, then the mill is responsible in damages peremptorily unless some of the defenses which I will refer to hereafter are made out.

One of the duties that the law requires of the mill, the employer of the plaintiff here, is to furnish her with a reasonably safe place in which to work. It is charged here that that place was not sufficiently lighted, and, therefore, not a safe place for her to work in. It does not require the mill to furnish her with the safest possible place in which to carry on that work, but it says a reasonably safe place in which to work. That is what the law requires of the mill, to furnish her with a reasonably safe place in which

REF.]

April Term, 1914.

to work, and to keep it in a reasonably safe condition for her to carry on her work in; and it says that the employee, the plaintiff in this case, has a right to assume that the place provided for her to work in by the mill is reasonably safe, and to rely upon that assumption that the place is reasonably safe for her work in.

Now then, in response to those charges made by the plaintiff, the young lady in question here, the mill comes in and denies all negligence on its part; denies that it failed to exercise due care. It goes a step further and says that even if the jury decide that it has not done that, that it is guilty of negligence as charged in the complaint, that yet still, under the law, this plaintiff would not be entitled to recover for two reasons, which they set up here as separate and distinct defenses; the one is that she herself was guilty of what is known in law as contributory negligence. That is, that even if you find that the mill was negligent and that her injury was brought about and caused to her as a proximate result of that negligence, that yet she herself was also negligent, and that her negligence contributed to her injury as a proximate cause thereof. And then it sets up another defense, known in the law as an assumption of risk. That is, they charge that she was injured by the risk ordinarily incident to the employment which she undertook, and that under the law, therefore, she would not be entitled to recover damages. Now then, gentlemen, contributory negligence in the law is the want of ordinary care by a person injured by the actionable negligence of another, concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred. That is, the law says that even if the mill be negligent, as charged, and you so decide, that yet still, if the greater weight of the evidence upon this defense satisfies you that she also was negligent—that is, failed to exercise due care herself—the two combining and contributing to the injury as proximate causes

thereof, that the law does not attempt to come in and apportion the degrees of violations, but says it would be setting a premium on carelessness to give damages to a person who is guilty of contributory negligence.

2 There are many who do not approve of that doctrine, and Congress has passed a law to abolish that, on the principle that self-preservation would cause a person to protect oneself. But we are bound by the law of this State, that where the evidence proves by its greater weight that the plaintiff was guilty of contributory negligence, he or she cannot recover.

And also we have the defense of assumption of risk. The burden is upon the mill here to prove it by the greater weight of the evidence, and says that where the plaintiff is injured by the risk ordinarily incident to the employment which he or she undertakes cannot recover. That does not

mean that the person assumes the risk of negligence;

1 but, as you very well know, that operating certain sorts of things are more dangerous than others; and the law says that when one undertakes to go into an employment of that sort he undertakes risks. And ordinarily there are certain risks incident to it that that person assumes; that is, to take risks, and if injured by one of those risks incident to the employment he cannot recover damages therefor. And there is a duty on the person employing labor to warn a person against a danger which is not ordinarily incident to the employment and which is not apparent and obvious to a person working there in the exercise of due care, which the law requires of such a person, and the failure to warn of such a danger is a breach of the duty which the law imposes upon the employer. It does not require the employer, the mill, to go and warn the employee of those things which are so obviously dangerous that the employee would know with ordinary care were dangerous. You would not have to go to work and warn a mill employee in a sawmill that the saw would cut

REP.]

April Term, 1914.

if he put his hand on it. But if you have some danger which would not be observable in the exercise of due care, then the law says you must warn him of it. Now, it is claimed that this mill didn't warn this girl of the danger of operating the machinery, and that that was an act of negligence on their part. Now then, of course, it is for you to say, gentlemen, whether she was injured by such risk as was so obvious, plain and observable by any one in the exercise of ordinary care as that she should know it in the exercise of ordinary care; if so, there would be no necessity to warn her. But if there was some danger that she would not know of by the exercise of ordinary care, it would be their duty to warn her of it.

She claims here only actual damages, nothing in the way of punishment or punitive damages, which you hear so much discussed here, but asks for actual damages which will actually compensate her for the injury sustained. And in considering that, you take into consideration not lawyers' fees, but the physical impairment of the person, loss of earning capacity; and if the injury be permanent, as there is no dispute as that it is in this case a permanent injury, you add to the damages sustained up to the time of this suit, this case that we are trying, such as it is reasonably certain will of necessity result in the future to her by reason of the injury; the idea being to compensate her for the injury sustained.

Now, there are some principles of law, gentlemen, which are set out in what are known as requests to charge, which the lawyers in the case have a right to hand up to the Judge and ask him to charge them to the jury, and if he fails and has not covered them in his general charge it is held to be an error in not charging them. Therefore, out of abundance of caution, I will read them to you, as they are correct statements of law. All of these are on behalf of the mill. The plaintiff has passed up no requests to the Court, but

left it to the general law, which has already been stated to you.

(Reads.) "1. This is an action based on the charge of negligence. Before plaintiff can recover she must satisfy you by the preponderance of the evidence that defendant was negligent in one or more of the respects set forth in the complaint, and that such negligence was the proximate cause of her injuries.

"2. The defendant owed the duty to the plaintiff to furnish her with reasonably safe machinery and appliances with which to work and with a reasonably safe and suitable place in which to work, but the plaintiff also owed a duty to the defendant. It was her duty to use reasonable care, to exercise her faculties of sight, if she could see, so as to avoid injury to herself, and even though the master failed in its duty to her in any respect, still, if she knew of the danger and could see the danger by which she was injured, it was her duty to exercise reasonable care to avoid being injured by it; and while a servant has a right to assume that machinery and appliances furnished him are reasonably safe and that the place to work in is reasonably safe, he cannot walk into an apparent danger and, without the slightest exercise of his faculties, handle a thing which the slightest degree of care would show him was unsafe and then recover damages because he may have thought it was all right. The law does not set a premium on that sort of thing. A servant has the right to rely upon the presumption that a thing is safe; but, nevertheless, the law says he must use ordinary care to avoid being injured by it, and if it is apparent to him that it is unsafe and he, nevertheless, goes ahead and uses it and gets hurt, the master in such case would not be liable. The law requires the servant to use his or her faculties to see what the risk is and what the condition of the machinery is.

"3. The master is not liable for damages merely because a servant gets hurt, but his liability rests solely upon the

REP.]

April Term, 1914.

question of his negligence; and negligence is the failure to exercise reasonable care under the circumstances—that is, such care as a person or corporation of ordinary prudence would exercise under the same circumstances. If the servant is employed to work with machinery that is obviously dangerous and that is open and of which the servant is aware, then there is no duty resting upon the master to warn the servant against an obvious danger, because it is the duty of the servant to exercise his or her own faculties to keep out of the way of such danger.

“4. I charge you that the plaintiff in this case in entering upon the contract of employment assumed all the risks of dangers that were *ordinarily* incident to her employment, and she also assumed any risks of dangerous machinery, if they were open and obvious and known to her, and if the injuries which she received were caused by a danger which was open and obvious and which she knew of, then she assumed the risks thereof and cannot recover.

(The word “ordinarily,” italicised above, was added in the foregoing request to charge by the Court.)

“5. I charge you further that if the plaintiff, by her own carelessness or negligence, contributed to her injuries as a proximate cause thereof, she cannot recover, no matter how negligent the defendant mill may have been, for it is the law that where both parties are negligent and the negligence of one commingles with the other and contributes along with it toward the injuries as the proximate cause, there can be no recovery.

“6. I charge you further that it is the duty of the servant to obey and observe the reasonable rules of his or her master, and I charge you further that the rule of a master forbidding servants to clean dangerous machinery while in motion is a reasonable rule.

“7. If you find that the defendant company had a rule forbidding its operatives to clean dangerous machinery while in motion, and if you find that the machinery by

which the injury occurred was dangerous, and that the plaintiff's injuries were caused by her effort to clean said machinery while in motion, and if you further find that she was aware of the presence of said dangerous machine and that it was open and obvious, and that she knew of the rule of the master, and, nevertheless, in violation of the rule, went ahead and undertook to clean the machine while in operation, then she cannot recover.

"8. I charge you further that a person of mature years and experience in the handling of machinery is *prima facie* presumed to know that it is dangerous to place his hands in contact with dangerous machinery, and if such a person is aware of the presence of such machinery and knows that it is there, there is no duty upon the master to warn such person against such machinery, as such a warning would be useless to a person who already knows of it.

"9. While it is the duty of the master to warn his servant against hidden or latent dangers, where the master knows or has reason to know that the servant is ignorant of such hidden dangers; yet, if the servant is already informed of the presence and extent of such danger, the master does not have to warn him or her, and if the servant, with knowledge of the danger, goes ahead and operates and works with such dangerous implement voluntarily and without any emergency, the servant assumes the risks of so doing, and cannot recover in case of injury.

"10. It makes no difference in this case whether the master had a rule forbidding the cleaning of moving machinery with the hands or not. Even if there was no such rule, the plaintiff was required to exercise her own intelligence in avoiding coming in contact with moving machinery; and if she knew of it, and if she was aware of the presence of such dangers and knew the danger, the law required that she should avoid it, even though there was no rule of the company, and even though she had not been warned against it."

REF.]

April Term, 1914.

Now, gentlemen, that covers everything in the case. It is for you to decide it on the facts and under these rules of the law.

Here is the paper upon which you write your verdict, marked on the outside "Summons for Relief." That contains a statement of the plaintiff's case; and I also hand you the answer, which contains the defense of the defendant. Write your verdict on the back of this paper marked "Summons for Relief"—either, we find for the plaintiff so much money—writing it out in words and not in figures; or, we find for the defendant—and let the foreman sign the verdict, and the date and the word "foreman."

Retire now, gentlemen, and decide the case.

Messrs. Bomar & Osborne, for appellant, submit: The charge stated broadly that the servant does not assume the risk of negligence by the master, without stating any exceptions to this broad principle. The reference to congressional action minimized the importance and soundness of the doctrine of contributory negligence. Rules governing exercise of discretion: 60 S. C. 140; 75 S. C. 399 and 83 S. C. 570, distinguished.

Messrs. Gwynn & Hannon and John Gary Evans, for respondent.

July 17, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This is an action for damages, alleged to have been sustained by the plaintiff through the negligence of the defendant.

After the close of the testimony, the attorneys for the defendant requested his Honor, the presiding Judge, to permit the jury to go to the scene of the accident, and examine the machine by which the plaintiff was injured, which request was refused. The accident occurred at

Spartan Mills in the city of Spartanburg, about a quarter of a mile from the courthouse.

The jury rendered a verdict in favor of the plaintiff for two thousand dollars, and the defendant appealed.

The first and second exceptions were not argued, and, therefore, will not be considered.

The third and fourth exceptions are as follows:

Third. "Error in charging the jury as follows, in connection with the charge on the assumption of risk and contributory negligence: 'There are many who do not approve of that doctrine (meaning the doctrine of assumption of risks and contributory negligence), and Congress has passed a law to abolish it, on the principle that self-preservation would cause a person to protect oneself.' It being respectfully submitted, that in so charging, his Honor minimized the force and effect of assumption of risks and contributory negligence, giving the jury to understand, that the highest authority in our government, did not look with favor upon it, and thus gave the jury an opportunity to take the same view as Congress. It being respectfully submitted that it was highly improper for his Honor to go out of the record and make such remarks to the jury."

Fourth. "Error in charging the jury, in connection with his charge of assumption of risks, as follows: 'That does not mean that a person assumes the risks of negligence.' Thus charging the jury that a servant does not assume the risks of defects and dangers, where the same is due to negligence of the master. It being respectfully submitted, that the said charge was erroneous and gave the jury to understand, that assumption of risk only applies to defects and dangers, not due to negligence by a master."

When those portions of the charge quoted in these exceptions are considered in connection with the entire charge, there is no reasonable ground for supposing that
1, 2 the result would have been different if his Honor, the presiding Judge, had not so charged.

REP.]

April Term, 1914.

The fifth exception is as follows:

Fifth. "Error in not sending the jury to the scene of the accident, or giving them an opportunity to go, so as to enable them to judge for themselves, whether or not the plaintiff could, and did, see the danger, which caused the injury, that being the only question in the case, especially as it appeared from the evidence, that the conditions and surroundings were exactly the same at the trial, as when the accident happened, and especially as the evidence of the witnesses, as to what could be seen, was conflicting. It is submitted that under the circumstances, it was an abuse of discretion in not permitting the jury, or at least offer them an opportunity, to go to the scene of the accident."

The appellant's attorneys have failed to satisfy this Court that there was an abuse of discretion on the part
3 of his Honor, the presiding Judge, in refusing the said request.

Judgment affirmed.

8901

WYLIE v. U. S. HEALTH & ACCIDENT INS. CO.

(82 S. E. 402.)

ACCIDENT INSURANCE. FORFEITURE. FRAUD. EVIDENCE. ISSUE FOR
JURY. APPEAL AND ERROR.

1. In the absence of a stipulation in contract that the existence of other insurance renders the policy void, the Court cannot declare the policy void on that ground.
- 1a. In an action on an accident policy which the insurer claimed was void because the insured had other insurance in force at the time of its issuance, where there was evidence for plaintiff tending to show that the insurer's agent who knew of the existence of the policy stated that it made no difference, a verdict for plaintiff cannot be overthrown on appeal, even though the insurer offered evidence that the insured informed the agent he was on his way to cancel the other policy; the conflict in the evidence raising a jury question.
2. Whether or not a release was obtained by fraud, being submitted to the jury, without objection, and there being evidence upon that issue, the jury had the right to decide it.

3. Where the claimant under an insurance policy offered to return a cheque given him as the consideration for a release, he may attack the release for fraud in an action on the policy.
4. The contract failing to stipulate that a policy of accident insurance was to take effect from time of delivery, rather than from the time the application was accepted and the policy issued, injuries occurring after the acceptance of the application and issuance of policy, though before its delivery to the assured were covered by it.
5. There being a conflict of testimony as to whether or not an insurance premium had been paid, that issue is for the jury.
6. There being no provision in the contract requiring the beneficiary under a policy of insurance to pay the premium, the question whether she had ever paid it was irrelevant.
7. Where justice requires a claimant to make good his tender to return the consideration received for a void release, the Court may require him to return such consideration, or give credit for the amount thereof on the judgment as a condition for affirmance of such judgment.

Before F. B. GARY, J., Spartanburg, November, 1913.
Affirmed.

Action by Ponetta Wylie, the beneficiary in a policy of accident insurance issued to John Wylie, against the United States Health and Accident Insurance Company. There was testimony tending to show that the premium was paid on December 18, 1910; that the policy was issued on December 23d or 24th, 1910, and the accidental injuries were received on December 26th or 27th, 1910, in consequence of which the assured died on February 15th, 1911. The other facts are stated in the opinion.

Mr. John Gary Evans, for appellant: The representation in application that the assured carried no other accident insurance was material: 14 Am. & Eng. Enc. of L. (2d ed.) 23, 68; 92 S. C. 392; 80 S. C. 396, distinguished. Proof insufficient to show fraud in obtaining release: 33 L. R. A. (N. S.) 536 to 543, note. Necessity for return of consideration given for the release: 61 S. C. 448 and

REP.]

April Term, 1914.

455; 56 S. C. 508; 63 S. C. 297; 84 S. C. 278; 24 N. E. 984; 35 S. W. 230; 117 Mass. 479; 63 Me. 440.

Messrs. Sanders & DePass, for respondent: *Waiver of right to declare policy void because of other insurance, of which defendant's agent had knowledge*: 52 S. C. 224-228; 75 S. C. 261. *Fraud affecting release*: 38 S. C. 199; 66 S. C. 77; 84 S. C. 41. *Delivery of policy as waiver of forfeiture*: 71 S. C. 356, 359; 63 S. C. 192, 197; 57 S. C. 358.

July 17, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

John G. Wylie took out a policy of accident insurance with the appellant company, and on the 27th December, 1910, was injured by a fall from a ladder and as a result of the fall died in February, 1911. The policy provided a death benefit of \$300.00 and a monthly accident indemnity of \$30.00.

The defendant refused payment and the case was tried before Hon. Frank B. Gary and a jury. The verdict and judgment were for the plaintiff, the beneficiary under the policy, for the full sum of three hundred dollars. From this judgment the defendant appealed upon five exceptions, as follows:

"1. The uncontradicted testimony shows that the insured, John Wylie, deceased, had, before and at the time of the issuance of the policy, insurance of a like nature in another company, and under the terms of the policy sued on here such other insurance rendered this policy null and void, and the verdict should be for the defendant."

It is true the application for insurance stated that there was no other insurance, but the agent of the company wrote the application. There is no dispute about the fact that

the agent knew of the existence of the other policy
1 of insurance. The only conflict in the testimony was that the witness for the appellant said that Wylie told him that he was on his way to cancel it, and the witness for the respondent said, that the agent of the appellant told him it did not make any difference. The record does not show that the existence of other insurance rendered the policy void; unless it did show it, this Court cannot declare this policy void on that ground.

2. The second exception is as follows:

“2. The uncontradicted testimony shows that the insured, John Wylie, during his lifetime, for a valuable consideration, released the company by an instrument in writing of all liability under the policy sued on in this case, and there being no evidence of fraud in obtaining said release, the verdict should be for the defendant.”

The presiding Judge told the jury that if they found that there was any fraud in procuring the release, then the release was void. The correctness of this charge

2 is not questioned and, under it, the jury had the right from the evidence to disregard the release.

3. The third exception is as follows:

“3. The uncontradicted testimony shows that the insured, John Wylie, accepted during the lifetime of John Wylie the check of the agent of the defendant company for twenty-five dollars in full settlement of all liability under the policy sued on in this case, and the undisputed testimony shows that such check has never been returned or tendered to the defendant company or its agents before the commencement of this action, and for that reason the verdict should be for the defendant.”

The record shows that the respondent's attorneys

3 offered to return the check, and this exception cannot be sustained.

4. “The undisputed testimony shows that the policy sued on in this case was never delivered to John Wylie until

REF.]

April Term, 1914.

after he had received the injuries alleged to have caused his death, and at that time he claimed to be in good health and had not actually paid the premium due to receive the policy, and under its terms such conduct worked a forfeiture of the policy, and the verdict should be for the defendant."

The record does not show that the policy was to take effect only from the time of delivery, and not from
4 the time the application was accepted and the policy issued. As to the nonpayment of the premium, there was a conflict in the testimony. The appellant's witness stated that he went to see Wylie and asked him
5 if he had paid the premium, and Wylie said he had paid it. The appellant's witness, without objection, put Wylie's statement in evidence, and that made it a question for the jury to say whether they would believe it or not. This exception is overruled.

5. Exception five is as follows:

"In that his Honor erred in refusing to allow the witness, Ponetta Wylie, to answer the following question: Q. Did you ever pay the three dollars, the first assessment? The error being that said question was proper and relevant to the issues made in the case."

This exception is overruled. There is nothing in the record to show that Ponetta Wylie was under any
6 obligation to pay the premium, and the question was irrelevant. Inasmuch as the check of the agent of the appellant is outstanding, it is nothing but right that the agent of the appellant should be protected, and it is
7 therefore adjudged, that a new trial be granted unless the respondent shall return the unpaid check to the appellant or its agent, or in lieu thereof shall credit the judgment with the amount of the check; but if the respondent shall comply with this requirement, then the judgment is hereby affirmed.

8902

WRAY v. ATLANTIC COAST LINE R. R. CO.

(82 S. E. 412.)

APPEAL AND ERROR. NEW TRIALS.

An order of the Circuit Court granting a new trial in a case removed into that Court by appeal from a magistrate's Court, because of error on the part of the magistrate in his findings of fact, is not appealable.

Before W. B. GRUBER, special Judge, Barnwell, October, 1913. Appeal dismissed.

Action by Minnie C. Wray against Atlantic Coast Line Railroad Company. From order granting a new trial, plaintiff appeals. The facts are stated in the opinion.

Mr. Thos. M. Boulware, for appellant, cites: *Measure of damages for loss of personal baggage*: 75 S. C. 58; 6 Cyc. 677; 68 S. C. 528. *Questions not raised by exceptions*: 34 S. C. 160; Code Civil Proc. 397. *Power of Court to order new trial*: Code Civil Proc. 407.

Messrs. Harley & Best, for respondent, cite: *Measure of damages*: 79 S. C. 155; 76 S. C. 338; 75 S. C. 58, *distinguished*. *Judgment according to justice of case*: 87 S. C. 267; 70 S. C. 178; 81 S. C. 461; 83 S. C. 547.

July 17, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This action was commenced in a magistrate's Court, for the recovery of ten dollars damages, to a trunk, while it was being transported by the defendant as baggage of the plaintiff, from Dunn, N. C., to Barnwell, S. C., and for the statutory penalty of fifty dollars for failure to pay the claim within the time required by law.

Judgment was rendered in favor of the plaintiff, for the full amount claimed, and the defendant appealed to the Cir-

REF.]

April Term, 1914.

cuit Court, whereupon his Honor, the presiding Judge, reversed the judgment and ordered a new trial, on two grounds, to-wit: (1) Because of error on the part of the magistrate in his charge as to the measure of damages, and (2) because he was "of the opinion that the plaintiff's testimony as to the value and damage to her trunk was not as full and satisfactory as it ought to have been, in order to have supported a verdict for ten dollars."

One of the grounds upon which his Honor, the Circuit Judge, based his order for a new trial was, that there was error on the part of the magistrate in his findings of fact. When an order for a new trial is based, upon a question of fact, it is not appealable. *Daughty v. R. R.*, 92 S. C. 361, 75 S. E. 553; *Kirkland v. Ry.*, 93 S. C. 574, 77 S. E. 709. Appeal dismissed.

8903

MAYBANK & CO. v. RODGERS.

(82 S. E. 422.)

SALES FOR FUTURE DELIVERY. EVIDENCE. TRIAL. ISSUES FOR JURY.

1. In our Courts, if there is any evidence upon an issue it should be submitted to the jury.
2. Statements or acts of an agent beyond the scope of his authority* are inadmissible in evidence against his principal.
- 2a. An agent to make a contract has no implied authority to rescind or vary the rights of his principal.
3. Testimony as to the making of other contracts by defendant under which actual delivery was had, was relevant as to his intention in making the contracts in question.
4. In action to recover upon a contract of sale for future delivery (under Civil Code, sections 3421, 3422), the plaintiff must prove not only the buyer's intention to receive, but also the intention of the seller to deliver, before he can recover for nondelivery.

FOOTNOTE.—As to the admissibility of parol testimony to show that the contract was made in furtherance of objects forbidden by law, see *Groesbeck v. Marshall*, 44 S. C. 538, 22 S. E. 743, and note in 16 Am. & Eng. Ann. Cases 388.

5. The recitals of a written contract for sale of goods for future delivery is not sufficient proof, under Civil Code, secs. 8421, 8422, of the intent of the parties to actually deliver and receive in kind the goods in question, but testimony *aliunde* may be introduced to show the real intent.
6. In action on contracts for future delivery of cotton, any evidence as to intention of the parties to actually deliver, presents a question for the jury.

Before SPAIN, J., Florence, November, 1913. Reversed.

Action by Maybank & Co., a corporation duly organized under the laws of South Carolina, against F. M. Rodgers. From a judgment for plaintiff, defendant appeals.

The facts are stated in the opinion.

Messrs. J. W. Ragsdale and Whiting & Baker, for appellant, cite: *Evidence of intention*: 89 S. C. 73; Wigmore Ev., sec. 377 (2); 14 A. & E. Enc. of L. 621; 60 Hun. 144; 14 N. Y. Supp. 498; 110 Pa. St. 177; 20 Atl. 413. *Wagering contracts*: 14 S. C. 621; 110 U. S. 499; 28 L. Ed. 225; 199 U. S. 481; 37 L. Ed. 819; 182 U. S. 461; 45 L. Ed. 1183. *South Carolina statutes construed*: 50 S. C. 543; 45 S. C. 344; 56 S. C. 111; 54 S. C. 382; 72 S. C. 35; 88 S. C. 572. *Similar statutes construed*: 92 Tenn. 265, 266; 77 C. C. A. 164; 85 Tenn. 572; 119 Mo. 126; 24 S. W. 184; 132 Mo. 150; 33 S. W. 783; 2 Elliott Contracts 1000. *Testimony outside of recitals in contract*: 20 Cyc. 931; 1110 U. S. 499; 28 L. Ed. 225, 230; 131 U. S. 336; 33 L. Ed. 172, 176; 14 A. & E. Enc. of L. 617; 11 Fed. 193; 63 N. E. 740; 70 N. E. 1076; 81 C. C. A. 355; 167 Ill. 388; 47 N. E. 763. *Issues should have been submitted to jury*: Const., art. I, sec. 25, art. V, sec. 26; Code Civil Proc., sec. 326; 25 S. C. 72. *Federal practice distinguished*: 38 Cyc. 1582; 116 C. C. A. 642; 210 U. S. 1; 52 L. Ed. 931. *Requests of both sides for a directed verdict did not amount to a submission of controverted questions of facts*: 223 Ill. 501; 84 N. E. 614.

REP.]

April Term, 1914.

Messrs. Willcox & Willcox and S. M. Wetmore, for respondent: Exclusion of testimony not prejudicial: 87 S. C. 415, 83 S. E. 68; 90 S. C. 425; 87 S. C. 67. Limits of cross-examination in discretion of trial Judge: 33 S. C. 39; 73 S. C. 392; 79 S. C. 122. Acts under like contracts evidence of intention: 74 Ill. App. 105. Recitals of contracts evidence of intent: 88 S. C. 572. Where both parties ask direction of verdict, the Court may direct it: 38 Cyc. 1582; 190 Fed. 126; 126 N. Y. Supp. 123; 64 N. E. 194; 203 Fed. 1; 157 U. S. 157; 39 L. Ed. 655; 210 U. S. 9; 52 L. Ed. 931. No presumption that the contract is illegal: 180 Fed. 783; 50 S. C. 588. Testimony de hors the contract not allowed: 15 S. C. 32; 6 S. C. 353; Greenleaf Ev., pars. 276-277. The intent to make a wager must be mutual: 149 U. S. 480; 37 L. Ed. 819; 115 Fed. 805; 125 Fed. 807; 154 Fed. 486. Reasons for direction of verdict immaterial: 73 S. C. 430.

July 18, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

This is an action on two contracts for future delivery of cotton, brought by the plaintiff, the buyer, against the defendant, the seller, for failure to deliver one thousand bales of cotton.

Both the plaintiff and the defendant requested the trial Judge to direct a verdict in their favor.

Under the case of *Beuttell v. Magone*, 157 U. S. 155, 39 L. Ed. 655, 15 Sup. Ct. 566, the presiding Judge felt bound to direct a verdict in favor of the one or the other, and directed a verdict in favor of the plaintiff.

Mr. Justice (now Chief Justice) White, in delivering the opinion in that case said: "There is obviously no disputed question of fact." In the later case of *Empire State Cattle Company et al. v. Ry. Co.*, 210 U. S., 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Am. & Eng. Anno. Cases 72, he says: "The

validity of the peremptory instruction must depend upon whether the evidence was so undisputed or was of such a conclusive character as would have made it the duty of the Court to set aside the verdict if the cases had been given to the jury, and verdicts returned in favor of the plaintiff."

In the Federal Courts the Judge has great latitude in dealing with facts in jury cases. In our State

1 Courts they have none, and if there is any evidence in favor of a party, the Judge cannot direct a verdict against him.

From the verdict so directed and the judgment entered thereon, the defendant appealed upon six exceptions, but discusses four propositions.

1. That it was error to exclude the answer to the following question asked the defendant: During the fall of 1909, did the representative of Maybank & Company, at this place, try to induce you to sell any contracts in Wall

2 street or not? The exclusion of this evidence was not error. It needs no citation to show that an agent to make a contract is not authorized to rescind, or vary the rights of the principal unless special authority is shown, and there was none shown here.

2. That it was error to require the defendant, on cross-examination, to answer the following question: "Mr. Rodgers, in previous year, or in a previous year, did you make a contract with Mr. McColl, for Inman & Company, for the future delivery of cotton?" Mr. McColl was the agent of the plaintiff and had been of Inman & Com-

3 pany. The fact that previous contracts had been made under which actual delivery had been made was some evidence of intention. The weight, depending on circumstances, was for the jury.

3. The third proposition is that his Honor erred in not directing a verdict in favor of the defendant. This

1 cannot be sustained, because there was some evidence to go to the jury.

REP.]

April Term, 1914.

4. The fourth proposition is, that his Honor
1 erred in directing a verdict for the plaintiff. This proposition is sustained.

The statutes (Civil Code, 1912, section 3421) provides: "Every contract * * * for the sale * * * at any future time * * * of any cotton * * * *shall be void* unless the party contracting * * * is at the time of making such contract (1) the owner or assignee thereof, or (2) is at the time authorized by the owner, or (3) unless it is the *bona fide intention* of both the parties to said contract at the time of making the same, that the cotton shall be actually delivered in kind by the party contracting to sell and shall be received in kind by the party contracting to receive the same."

Section 3422 provides: That in any and all actions brought in any Court to enforce such contract, the burden of proof shall be upon the plaintiff to establish that at the time of making such contract the party making the same was (1) the owner, or (2) was at the time authorized by the owner to make and enter into such contract, or (3) that at the time of making such contract it was the *bona fide* intention of both parties thereto that the said cotton should be actually delivered and received in kind by the said parties at the future period mentioned therein.

This Court would have to shut its eyes to the history of our own times if it did not recognize the existence of a war upon contracts for future delivery. The conflict culminated in these statutes. These statutes declare contracts for future delivery void unless (1) the seller is at the time of making the contract the owner, or (2) authorized by the owner to make and enter into such contract, or (3) it was the *bona fide* intention of both parties that the goods should be delivered and received. It is the duty of the Courts to declare the meaning of the statute and not to consider its wisdom. The question is what is the intention of the law-making department, as expressed in the statutes? Section

3421 declares every contract, for the future delivery of cotton, void with three exceptions. The general rule is that where there is a general prohibition, with exceptions, the burden of proof is with him who claims to be within the exception. This is a general rule, and general rules have exceptions. The legislature took no chances. In section 3422 it declared that in all actions on contracts for future delivery, the burden of proof shall be on him who claims under such contract. It did not content itself with general terms. There must be no room for mistake here. The claimant must prove specific things, *i. e.*, (1) that the seller was, at the time of making the contract, the owner, or (2) was authorized by the owner to make and enter into such contract, or (3) that it was the *bona fide* intention of both parties thereto that the cotton should be actually delivered and received in kind. The contention here is over the intention of the parties. It is not contended that the defendant was the owner, or authorized by the owner to make and enter into such contract, at the time of the making of the contract. The respondent claims

4 that it showed that the buyer intended to receive, and if the seller did not intend to deliver he was bound to notify the buyer. The statute does not so provide. It provides that (in this case) the buyer shall not only prove its intention to receive, but the intention of the Mr. Rodgers to deliver. There is a test of construction that is applicable here. If it had been the intention of the legislature to require the buyers to prove the intention of the seller before he could recover for nondelivery, could it have declared the law more clearly than it has done? It could not have been done. It requires legislative power to relieve the plaintiff of the burden of proving the defendant's intention. That power is not lodged in the Courts.

The respondent says the intention of the defendant is proved by the language of the contract, and men are bound by their contracts. Here there is a wide distinction between

REF.]

April Term, 1914.

lawful contracts and contracts that are unlawful or bear upon their faces suspicion of unlawfulness.

Contracts that are lawful cannot be varied and will be enforced as written, except for mutual mistake and fraud. Contracts that are unlawful will not be enforced. Con-

tracts that are suspicious will be inquired into and
5 proof *aliunde* allowed. The statute (sec. 3422)

starts out with a contract and then goes on to require proof. If the contract itself were sufficient proof, then section 3422 is meaningless. This section does not purport to require the defendant to make proof of unlawfulness, but requires the plaintiff with the contract in his hand to make proof. The contract, therefore, is not sufficient proof.

The statutes do not stop here. Section 3423 provides that, if the defendant in an unlawful contract for future delivery had paid the loss, he would have been entitled to recover back his money and his oath shall be *prima facie* proof of the unlawfulness of the contract.

If it was the *bona fide* intention of both the buyers and seller, at the time of the making of the contract, that this cotton should be delivered and received, plaintiff ought to have his judgment for his loss. If it was not the *bona fide* intention of both parties, at the time of the making of the contract, that the cotton should be delivered and received in kind, then the plaintiff is not entitled to a judgment. This is a question of fact for the jury, and the case is remanded to the Circuit Court for a new trial.

Judgment reversed.

MR. CHIEF JUSTICE GARY and MR. ASSOCIATE JUSTICE HYDRICK concur in the result.

8904

PATTERSON v. WALKER.

(82 S. E. 432.)

VENDOR AND PURCHASER. CONTRACTS.

Where a tract of land is sold for a sum in gross, by metes and bounds pointed out to the purchaser, as containing twenty acres, and it is subsequently ascertained by a survey that the area within the boundaries was only twelve and 4-10 acres, the vendee is not entitled to recover for the deficiency, on ground of gross mistake, there having been no fraud or misrepresentation on the part of the vendor.

Before ERNEST GARY, J., Barnwell, May, 1913. Affirmed.

Action by A. Patterson against Henrietta Walker and Jerry Walker. From an order of nonsuit, the plaintiff appeals. The facts are stated in the opinion.

Mr. R. C. Holman, for appellant, submits: *The variance of 38 per cent. in area shows a gross deficiency*: 69 S. C. 261; 92 S. C. 384, 391, 393.

Mr. Thos. M. Boulware and *Mr. Thos. H. Peebles*, for respondent. The former cites: 92 S. C. 384; 41 S. C. 508; Harper L. 292; 54 S. E. 506; 69 S. C. 261; 48 S. E. 50.

July 18, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This is an appeal from an order of nonsuit.

On the 10th day of December, 1910, the defendant, Henrietta Walker, executed a deed of conveyance of a tract of land to the plaintiff, which is thus described: "All that certain tract, piece, or parcel of land, situate, lying and being in Barnwell county, in the State aforesaid, containing and measuring about twenty (20) acres, more or less, and bounded as follows: On the north by lands of Floyd

REP.]

April Term, 1914.

Walker; on the south by lands of Lewis Frazier; and on the west by lands of Sarah Ann Reed. The land hereinabove described, being the same conveyed to me, by Briggs Buist & Co."

The complaint alleges, that previous to the times thereafter mentioned, the defendant, Henrietta Walker, represented to the plaintiff that the tract of land contained twenty acres, more or less.

That the plaintiff went into possession of said tract of land under said deed, believing that the same contained twenty (20) acres, as represented by said deed and said statements as aforesaid, until the 10th day of May, 1912, at which time plaintiff called in a surveyor to run out said tract of land; and then the same was found to contain only twelve and four-tenths (12 4-10) acres.

That said plaintiff bought said tract of land on a basis of twenty (20) acres, that is to say, as plaintiff understood, at the price of twenty-six and 50-100 (\$26.50) dollars per acre, the same being one-twentieth of the amount paid therefor, and the actual survey showing only twelve and four-tenths (12 4-10) acres, leaves a deficiency of seven and six-tenths (7 6-10) acres, which at twenty-six and 50-100 (\$26.50) dollars per acre, amounts to the sum of two hundred and one and 40-100 (\$201.40) dollars.

The demand was for judgment in the sum of two hundred and one and 40-100 (\$201.40) dollars, and for costs.

The defendant denied each and every allegation of the complaint, and alleged by way of defense, that the sale was in gross, and that the purchase price was agreed upon, by the parties to said deed, without reference to the number of acres contained within the boundaries of said tract of land.

The appellant's attorney conceded that the complaint does not allege fraud or misrepresentation.

The plaintiff testified that the defendant, through her agent, pointed out the land to him by metes and bounds.

At the close of the testimony, his Honor, the presiding Judge, granted a nonsuit, from which the plaintiff appealed.

The appellant's attorney, in his written argument, thus states the main question involved: "Inasmuch as this Court has heretofore refused relief in like cases, unless a gross deficiency in acreage is shown, the first exception raises the main question to be determined, viz.: Does the 7.60 acres shortage out of 20 acres (which equals 38 per cent.) show a gross deficiency?"

In the case of *Erskine v. Wilson*, 41 S. C. 198, 19 S. E. 489, it was held, that "where a tract of land is sold for a sum in gross, by metes and bounds, said to contain 253 acres, more or less, with general warranty of the premises, and a plat calling for this number of acres is delivered with the deed, the vendee is not entitled to recover under the covenant of warranty, upon it being made to appear, that while the plat was correct, in its courses and distances, it was erroneous in its calculation of area, the tract, in fact, containing but 128 acres, there having been no fraudulent representation." (*Syllabus.*)

The reasons assigned in that case for refusing relief show conclusively that the exception raising the question under consideration cannot be sustained.

Having reached this conclusion, the other questions raised by the exceptions, are merely academic.

Appeal dismissed.

REP.]

April Term, 1914.

8909

MITCHELL ET AL. v. HAMILTON ET AL.

(82 S. E. 425.)

APPEAL AND ERROR. EXCEPTIONS. ACTION FOR RECOVERY OF POSSESSION OF REALTY. ADVERSE POSSESSION. CHARGE. EVIDENCE. LEGAL AND EQUITABLE DEFENSES. ISSUES. TRIAL.

1. An exception not argued will be overruled.
2. Tax receipts are admissible in evidence, as tending to prove claim of ownership and that the State has parted with its title, in actions for recovery of real property.
3. An exception to the refusal of a motion, which does not disclose the grounds of the motion, is insufficient.
4. The admission of irrelevant testimony will not be reviewed on appeal, unless shown to have been prejudicial to appellant.
5. Where a deed has been admitted to show color of title under which an entry was made upon lands, an exception to the failure of the Judge to instruct the jury to disregard it, is overruled.
6. A modification of the charge "that where a party goes into possession of a piece of land, and holds the same adversely for ten years, and has thus perfected his right to hold by adverse possession, his possession thus obtained cannot be disturbed by one purchasing from the former owner," by adding, "I charge you that, if he gets that possession rightfully," is erroneous, as the right of entry is immaterial, if, after disclaiming the title under which he entered, or otherwise, one subsequently acquires title by adverse possession.
7. An exception which refers to a request to charge without disclosing the proposition of law requested is insufficient.
8. A charge requiring a person to hold adverse possession of lands for twenty, instead of ten, years in order to obtain title by adverse possession is erroneous. It is only where the party entering into possession relies upon the presumption of a grant that the adverse possession must continue twenty years.
- 8a. Where a purchaser enters into possession of land under contract of purchase, his rights against the vendor or subsequent purchaser are equitable.
- 8b. Equitable issues in a legal action are triable by the Court.
9. All defenses, both legal and equitable, may be interposed in an action for recovery of real property, and leave is granted the defendants to amend their answer to set up an equitable defense.

Before BOWMAN, J., Ridgeland, September, 1913. Reversed.

Action by Fannie B. Mitchell and Rebecca Mitchell, by their guardian *ad litem*, Nancy Mitchell, against Elliott

Hamilton and W. P. Tillinghast for recovery of possession of land. From a judgment for plaintiffs, defendants appeal. The facts are stated in the opinion.

Mr. W. P. Tillinghast, for appellant, cites: *Burden on plaintiffs to prove title*: 1 Mills 184; Tyler, Ejectment, 72, 738; 15 S. C. 274, 277. *Adverse possession under contract to purchase after twenty years*: Civil Code 2449. *Charge on adverse possession*: 21 S. C. 480.

Mr. George Warren, for respondents.

July 20, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This is an action to recover possession of a small tract of land.

The answer was a general denial.

The jury rendered a verdict in favor of the plaintiffs for possession of the land, and the defendants appealed.

The first exception is as follows:

"His Honor erred in refusing defendants' motion for a new trial and abusing his discretion in so refusing, 1, 3 when the verdict was clearly inconsistent with the law and the evidence."

The record does not disclose the grounds of the motion, nor was the exception argued by the appellants' attorneys. It is therefore overruled.

The second exception is as follows:

"His Honor erred in not sustaining defendants' objection, to the introduction of tax receipts offered in evidence by plaintiffs, and in expressing an opinion, as to the weight and importance to be attached to same."

The cases of *Ellen v. Ellen*, 16 S. C. 132, and *Busby v. Ry.*, 45 S. C. 312, 23 S. E. 50, show that the receipts

2 were admissible in evidence, for the purpose of proving a claim of ownership, and that the State had parted with its title to the land.

REF.]

April Term, 1914.

This exception cannot be sustained.

The third exception is as follows:

"His Honor erred in not granting defendants' motion for a nonsuit, at the close of the plaintiffs' testimony."

This exception fails to state the grounds upon
3 which the motion was made, and, therefore, will
not be considered. *Jumper v. Bank*, 39 S. C. 296,
17 S. E. 980; *Holtzclaw v. Green*, 45 S. C. 494, 23 S. E.
515; *Tucker v. Ry.*, 51 S. C. 306, 28 S. E. 943.

The fourth exception is as follows:

"His Honor erred in permitting A. Q. Wilson, plaintiffs' witness, over the objection of counsel for defendants, to testify that he had paid money to Nancy Mitchell, when such testimony was absolutely irrelevant and incompetent."

This exception must be overruled, for the reason
4 that appellants' attorneys have failed to satisfy this
Court that there was prejudicial error.

The fifth exception is as follows:

"His Honor erred in failing to instruct the jury to disregard the deed executed by H. D. Burnett, administrator, to Fanny B. Mitchell and Rebecca Mitchell,
5 to the land in dispute, and to let it have no weight
with them, in arriving at their verdict."

The deed was admissible in evidence, for the purpose of showing, that the plaintiffs or their ancestors entered under color of title.

The exception is overruled.

The sixth exception is as follows:

"His Honor erred in qualifying defendants' fifth
6 request to charge, by adding: 'If he gets that possession rightfully.' "

The fifth request was as follows:

"I charge you that where a party goes into possession of a piece of land, and holds the same adversely for ten years, and has thus perfected their right to hold by adverse posses-

sion, their possession thus obtained, cannot be disturbed by one purchasing from the former owner."

His Honor, the presiding Judge, said: "I charge you that, if he gets that possession rightfully."

The modification of the charge was erroneous, for the reason that even when a person enters rightfully into possession of land, he may change the nature of his possession, by disclaiming the title under which he entered, and giving proper notice of such fact; or, he may enter as a trespasser in the first instance, and acquire title by adverse possession. *McCutcheon v. McCutcheon*, 77 S. C. 129, 57 S. E. 678, 12 L. R. A. (N. S.) 1140.

This exception is sustained.

The seventh exception is as follows:

"His Honor erred in refusing defendants' sixth request to charge."

What was said in considering the third exception,
7 disposes of this exception.

The eighth exception is as follows:

His Honor erred in charging the jury, as follows:

"Now, gentlemen, if a man goes into possession under a contract to purchase, he holds that possession, as the possession of the man selling him that land, until after he renounces his relation to the seller; if he leaves the
8 place and then comes back, and says he claims under his own right, and holds it for twenty years, he has a title by adverse possession.' The error being, such charge was misleading and erroneous."

This charge was erroneous, as it is only necessary to hold adversely for *ten* years, in order to acquire a title to land. It is otherwise where the party entering into possession relies upon the presumption of a grant, as in that case, the adverse possession must continue for twenty years. *Ellen v. Ellen*, 16 S. C. 132; *Garrett v. Weinberg*, 48 S. C. 28. 26 S. E. 3.

This exception is sustained.

REF.]

April Term, 1914.

This disposes of all the exceptions, but there is a matter which appeals to this Court, for the exercise of its discretion in regard to amendments. The defendants requested his Honor, the Circuit Judge, to charge as follows:

"I charge you that where one has full knowledge of the contract to purchase land, entered into between the owner and the person in possession of the land, one having full knowledge of such contract, purchasing this land from the owner, has no title to the land in question, and his deed thus obtained must be set aside as fraudulent and void. This is based upon the fact, that where one pays a part of the purchase price of land, he has a superior right to all others, and an equitable interest in the land."

His ruling was as follows:

"I cannot charge you that, just as it is here, it may be under certain circumstances, but the ordinary rule is, that if I own a piece of land, and undertake to sell it to you and put you in possession of it, and you paid a large portion of the purchase money, then Mr. C. comes along and buys the place from me, and buys only what interest I have, whenever you want to perfect your title you must bring an action for specific performance against him, and not me. When I sold him the place, I put in him all the title in me, and you can bring a suit against him just as you could have against me."

There was testimony to the effect, that Alonzo Hamilton, from whom the defendants claim title, entered into possession of the land in 1890, under a contract to purchase it from those, under whom the plaintiffs derived their title, and that he remained in possession of the land until his death, which took place a year or two before the case was tried on circuit. His rights were therefore equitable, and were properly triable by the Court, and not by a jury. *Adicks v. Lowry*, 12 S. C. 98; *Brownlee v. Martin*, 21 S. C. 492.

His Honor, however, seemed to entertain the opinion, that it would be necessary for the defendants, to bring an independent action for specific performance, in order to assert their rights under the contract, made
9 between Alonzo Hamilton and the plaintiffs' ancestors. Such is not the case. All issues, both legal and equitable, can be disposed of in one action. But the legal must be submitted to a jury, and the equitable must be tried by the Court, unless issues are framed by the Court in the manner provided by law.

The defendants did not, in a formal manner, set up the facts upon which they relied as a defense, although they introduced testimony to sustain it.

In order that the issues may be clearly defined upon the new trial, the defendants should have the opportunity of amending their answer, in the particulars just mentioned.

It is, therefore, the judgment of this Court, that the judgment of the Circuit Court be reversed, and the case remanded for a new trial, and that the defendants be allowed to amend their answer, within twenty days after the remittitur is sent down, by setting up the defense hereinbefore indicated.

MR. JUSTICE GAGE did not sit in this case.

8908

STATE v. WINTER.

(82 S. E. 419.)

CRIMINAL LAW. GIVING CHEQUES WITH FUNDS.

Giving a cheque prior to the date that it bears, it bearing a subsequent date as the time at which it should be payable, has only the effect of a promise to pay at such future time, and the giving of such cheque at a time when the drawer has no funds to meet it, is not a violation of Crim. Code, sec. 208, making it a misdemeanor to draw

Ref.]

April Term, 1914.

a cheque when the drawer has no funds on deposit to meet it. In a prosecution for drawing and uttering a cheque without funds in bank to meet same, evidence that the cheque was antedated was admissible.

Before MEMMINGER, J., Columbia, September, 1913.
Reversed.

The defendant, E. Winter, being convicted for a violation of Criminal Code, sec. 208, appeals. The facts are stated in the opinion.

Mr. D. W. Robinson, for appellant, submits: Ordinarily a promise to pay at a future event is not a criminal fraud: 2 Bishop Crim. Law (5th ed.) 419, 420; 32 S. E. 318; 124 N. C. 796; 37 S. E. 268; 127 N. C. 553. A postdated cheque no more than promise to pay: 73 N. Y. 80; 86 N. E. 993; 41 L. R. A. (N. S.) 173, 174, note. It is only an inland bill of exchange: 1 Morse Banks & Banking (4th ed.), sec. 381a, pp. 673, 674. The statute will not be construed to create imprisonment for a mere debt: 79 S. C. 14; 21 L. R. A. (N. S.) 243, 244; 153 Fed. 986; 38 Fed. 144, 145; 52 S. E. 74; 2 L. R. A. (N. S.) 1010; 37 S. E. 268; 63 S. E. 949; 143 N. C. 620; 56 S. E. 918. Parol evidence as to time it was given, and postdating, admissible: 11 Rich. Eq. 582; 68 S. C. 109, 110; 39 S. C. 366; Jones on E. v., sec. 435.

Mr. Solicitor Cobb for the respondent.

July 18, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

The defendant was indicted and tried before his Honor, Judge Memminger, under section 208 of the Criminal Code, for drawing and uttering a check for \$30.25, upon a bank,

without sufficient funds to meet the same. He was convicted by the jury and sentence imposed.

Defendant appeals and by fourteen exceptions questions the correctness of his Honor's ruling. The ninth exception complains of error in refusing the defendant's first request

to charge, which is as follows: "If the check in ques-

1 tion in this case was given prior to the date it bears, and it was dated at a subsequent date as a time upon which it was to have been paid, it has only the effect of a promise to pay, at a future time, and is not within the statute making it a misdemeanor to draw a check when the drawer has no funds to meet it." This was a correct proposition of law applicable to the case and should have been charged. The defendant had the right to show that the check was given at a different time from that at which goods were purchased and obtained, and it was competent for the defendant to show by evidence other than the check itself that it was not correctly dated. If goods were obtained at one time, and check given subsequently that would not be a misdemeanor, but a simple promise to pay. If check was dated ahead, and it was expressly stated at the time it was passed that the drawer had no funds in the bank, such check would only mean a promise on the part of the drawer to do a future act and have funds in the bank at the future time stated in the check, and this would be no more than an obligation to pay in the future, and the check would only be an evidence of debt. His Honor was in error in interpreting the statute as he did in the charge to the jury, and in refusing to allow the defendant to show by the prosecuting witness that the check was dated ahead, and to show that the prosecuting witness had admitted that the check was dated ahead at the time it was given, and the exceptions raising these questions are sustained. Judgment reversed. New trial granted.

REF.]

April Term, 1914.

8907

STATE v. SMALLS.

(82 S. E. 421.)

CRIMINAL PROCEDURE. COURT OFFICERS. CHARGE ON FACTS.

1. Where the solicitor of the Circuit is unable to attend Court and perform the duties of the office, the presiding Judge may temporarily appoint a member of the bar to act in the place of the solicitor, and bills prepared and signed by such attorney *pro tempore* are valid. (NOTE: See Const. 1895, art. V, sec. 29.)
2. The force and effect of any evidence is for the jury, and a charge that the defense of *alibi* is to be received with caution, is upon the facts in violation of Const., art. V, sec. 26.

Before RICE, J., Charleston, February, 1914. Reversed.

The defendant, Allen Smalls, convicted, under an indictment for arson, and sentenced to imprisonment for ten years, appeals. The facts are stated in the opinion.

Messrs. Logan & Grace and John I. Cosgrove, for appellant, submit: A solicitor pro tempore, appointed by the Court under Const., art. V, sec. 29, is confined to the prosecution of cases in which the grand jury have found indictments on bills submitted by the legally elected and commissioned officer; and cite 2 S. C. 263, charge on facts prejudiced and deprived defendant of free and untrammelled consideration of his defense of alibi: 85 S. C. 277; 82 S. C. 488; 24 S. C. 442; 59 S. C. 232; 71 S. C. 58; 32 S. C. 45; 85 S. C. 276; Ib. 282.

Mr. Solicitor Peurifoy and Mr. Frank F. Herndon, for respondent.

FOOTNOTE.—See case of *People v. Morgan*, 90 Ill. 558, in which the practice of the Court to appoint persons to act as clerks and State's attorneys, temporarily to fill vacancies, as well as special masters, etc., is reviewed at length.

July 18, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

The defendant was indicted for arson, charged with burning a ginhouse. The case was called for trial before his Honor, Judge Rice, and a jury. A motion was made to quash the indictment on the ground that it was signed by F. F. Herndon, acting solicitor, and not by the duly elected and qualified solicitor of that circuit, the contention being that the indictment was void *ab initio* there being no such officer as acting solicitor, and there was no vacancy in said office of solicitor, and the appointment could only be made as provided for by section 722 of vol. I of the Code of Laws of South Carolina by appointment by the Governor and confirmation by the Senate. The motion was overruled and defendant put on trial and set up as a defense the plea of *alibi*. The jury returned a verdict of guilty with recommendation to mercy. Defendant moved for a new trial, which was refused, and defendant was sentenced to imprisonment for ten years. After sentence defendant appealed and asks reversal. The

1 first four exceptions allege error in not quashing indictment on the grounds asked for. These exceptions are overruled for the reason, that it appears that on February 9, 1914, his Honor, Judge Rice, presiding at the Court of General Sessions for Charleston county, passed an order appointing F. F. Herndon, Esq., acting solicitor for that term, by reason of the fact that the solicitor, the Hon. John H. Peurifoy, was unable to attend Court and perform the duties of his office on account of illness. His Honor clearly had the right under the circumstances to make the appointment for the purposes indicated in his order in the interest of justice and the orderly administration of the same, in order that the Court might proceed with business and the trial of persons charged with violation of law, and these exceptions are overruled.

Rep.]

April Term, 1914.

The third exception to the Judge's charge to the jury is as follows: Because his Honor, the presiding Judge, erred, it is respectfully submitted, in charging the jury as to the defense of *alibi*: "Now, Mr. Foreman, and gentlemen of the jury, I think I may say it, and I am going to say it anyhow, that *alibi* is always to be received with caution, the defense of *alibi*, but when it is made out then it is a complete defense;" the error being that his Honor invaded the province of the jury by singling out one plea for the defendant and differentiating that from the rest of the evidence on behalf of the defendant, and prejudiced and deprived the defendant of his right under the Constitution to have the jury exclusively, uninfluenced by any expression of opinion by the Circuit Judge, pass on the force and effect and weight and sufficiency of all of the evidence. This exception must be sustained. Article V, section 26 of the Constitution of 1895 is: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." The intention of this section was intended clearly to leave to the jury all questions of fact and to prevent the Judges from forcing upon juries their own convictions as regards matters of fact. The force and effect of any evidence is for the jury, it is for them to determine what credence they will give to it and what weight it will have with them. The juries are the judges of all matters of fact and cannot look to the Court for a controlling view, they are to form their own conclusions from the facts submitted to them, and the Court cannot employ its influence over the minds of the jurors to force upon them its conclusions in any case. The Court is not at liberty to give its conclusions in any particular portions of the testimony. The real object of this clause in the Constitution is to leave the decision of all questions of fact to the jury exclusively uninfluenced by any expressions of opinion by the Judge. The Judge's position would naturally add great weight to any opinion he might express upon any question of fact arising in a case, and for this reason he

should carefully refrain and avoid expressing any opinion that he may have formed from the facts as to the force, weight, and effect, leaving it to the jury to draw their own conclusions and not impress upon them any impressions that the testimony may have made in the mind of the Judge. The juries are to determine all questions of fact uninfluenced by the Judge and unbiased by his impressions. His Honor was in error in charging the jury that the defense of *alibi* was to be received with caution. That defense is entitled to be considered by the jury under all the facts and circumstances of the case the same as any other defense, and it is for them to say what credence they give to it, and they do not have to receive it with any more caution than they do any other evidence in the case. The rules governing one class of cases must rest with equal force with others. The plea of insanity, *alibi*, and self-defense are all to be measured by the same standard, and his Honor had no right to prejudice the jury by stating to them as he did that the plea of *alibi* must be received by the jury with caution.

Judgment reversed and new trial granted.

8905

SAULS-BAKER CO. v. ATLANTIC COAST LINE R. R. CO.

(82 S. E. 418.)

CARRIERS. STIPULATION OF TIME FOR PRESENTATION OF CLAIM. WAIVER.

Where a statement of claim on account of a loss of goods (of which loss the carrier's agent had notice within the time limited for presentation of claims) is presented, after the time limited by the contract, and the carrier receives same; and requests the claimant to furnish further information with reference thereto, and considers the claim on its merits without notice that the time limit would be relied upon, it waives its right to insist upon such limitation.

Before SPAIN, J., Florence, November, 1913. Affirmed.

REP.]

April Term, 1914.

Action by Sauls-Baker Company against Atlantic Coast Line Railroad Company. From order dismissing an appeal from a magistrate's Court, the defendant appeals.

The facts are stated in the opinion.

Mr. F. L. Willcox, for appellant, cites: 78 S. C. 36; 84 S. C. 249; 91 S. C. 503.

Mr. Philip H. Arrowsmith, for respondent, cites: *Loss presumed to have occurred on line of delivering carrier*: 91 S. C. 270; 78 S. C. 35. *Stipulation does not apply*: 84 S. C. 249; 91 S. C. 506. *Stipulation was waived*: 91 S. C. 503; 85 S. C. 26; 70 S. C. 23. *Finding of fact not subject to review by this Court*: 93 S. C. 80.

July 18, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This action was commenced in a magistrate's Court, on the 14th day of December, 1912, for the recovery of one and 20-100 (\$1.20) dollars, the alleged value of fifteen bottles of ginger ale, and fifty dollars penalty for failure to pay the claim, within the statutory period.

The following statement appears in the magistrate's report of the trial:

"From the testimony and the documentary evidence in the case submitted to me without a jury, I find the following facts: On August 12, 1911, the Southern Railway Company issued its bill of lading to plaintiff's consignor, for one case of ginger ale, consigned to plaintiff at Lake City; upon the reverse side of said bill of lading, among other stipulations, is found the following: 'Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin, within four months after delivery of the property, or, in case of failure to make delivery, then within four months after reasonable time for delivery

has elapsed. Unless claims are so made, carrier shall not be liable.'

Defendant's freight bill bearing date August 19, 1911, bearing the following endorsement: 'Box robbed, 12 bottles gone. R. Signed L. G. A., Agent,' was next offered in evidence, with the testimony of plaintiff, that the notation had been made thereon, by an agent of defendant.

On October 10, 1912, plaintiff filed its written claim for \$1.20.

Claim was declined by two letters of defendant, addressed to plaintiff bearing dates respectively, November 4th and 6th, 1912, in the following words: 'Have claim reduced to invoice cost and I will pay at once; hurry the return of papers.'

Plaintiff's invoice shows the case to contain one hundred pints of ginger ale, of the value of seven cents per pint, adding freight of \$1 on case makes the total loss of plaintiff, to wit: fifteen bottles at eight cents per bottle, \$1.20, as claimed.

The defendant's answer denied every material allegation of the complaint, and set up the above quoted stipulation on the bill of lading, as a defense.

Upon hearing argument pro and con, and a review of the authorities, I concluded that the stipulation was a reasonable one, but under the facts of this case the reason for the enforcement of the stipulation was wanting, the defendant having waived its right to demand written notice of loss or damage, by acknowledgment on the freight bill of the shortage at the time of delivery.

There was no contest as to the facts, and viewing the letter as above I rendered judgment * * * for the amount sued for, interest and the penalty, together with the costs and disbursements * * *.

The point made in defendant's second exception was not made or discussed at the trial of the case, but if it had, from

REP.]

April Term, 1914.

the view that I take of the law and facts in this case, it could not affect the result."

The second exception to which the magistrate referred was as follows:

"The magistrate erred, it is respectfully submitted, in holding and ruling, that a mere notation on the expense bill of a shortage, in case of a shipment moving over more than one line was sufficient to show a waiver of the right of the protection afforded by the provision of the bill of lading, against claims not filed within four months from the date of delivery of shipment."

The only assignment of error made by the other two exceptions in different form, was "that the magistrate erred in holding and ruling that a mere notation on the expense bill of a shortage, was sufficient to show a waiver of the right, to the protection afforded by the bill of lading, against claims not filed within four months from date of delivery of shipment."

His Honor, the Circuit Judge, dismissed the appeal on the authority of the cases of *Deaver-Jeter Co. v. So. Ry.*, 91 S. C. 503, 74 S. E. 1071; Ann. Cases 1914a, 230; *Kelly v. So. Ry.*, 84 S. C. 249, 66 S. E. 181, 137 Am. St. Rep. 842, and *Charles v. A. C. L. Ry.*, 78 S. C. 36, 58 S. E. 927, 125 Am. St. Rep. 762.

The defendant thereupon appealed to this Court upon a single exception, to wit:

"His Honor, the Circuit Judge, erred, it is respectfully submitted, in finding and holding that a mere notation on the expense bill of a shortage, in case of a shipment moving over more than one line, was sufficient to show a waiver of a right to the protection afforded by the provision of the bill of lading, relieving it from liability for claims, not filed within four months from the date of the delivery of the shipment."

It will be observed, that this exception and the second exception hereinbefore mentioned, raise the same question.

which the magistrate states was not made or discussed, on the trial of the case before him.

The only authority we deem it necessary to add to those, cited by his Honor, the Circuit Judge, is, *Hays v. Tel. Co.*, 70 S. C. 16, 48 S. E. 608, 67 L. R. A. 481, in which the Court used this language: "Where the statement or proof is presented, after the time limited by the contract, and the claimant thereafter does nothing, and incurs no expense or trouble, in consequence of any demand of the party to be charged, yet waiver of the form of the claim and of the time limit, will be implied, if the statement or proof is retained and considered on its merits, without notice that the time limit, or lack of written demand in proper form, will be relied on."

The defendant used the following language in the two letters hereinbefore mentioned: "Have claim reduced to invoice cost, and I will pay at once; hurry the return of papers." The record shows that the amount claimed, corresponded with the invoice cost, thus showing an additional ground of waiver.

Appeal dismissed.

8910

PARIS MOUNTAIN WATER CO. v. CAMPERDOWN MILLS.

(82 S. E. 417.)

PUBLIC SERVICE CORPORATIONS. CONTRACTS. INTEREST.

1. An answer in an action by a public service corporation admitting that defendant contracted with such corporation to pay for water consumed at the rate of 15 cents per 1,000 gallons, and that it consumed the quantity alleged in the complaint, and alleging that plaintiff during the life of the contract furnished other cotton mills, situate in its territory, and under similar conditions as defendant, with water at the rate of 10 cents per 1,000 gallons, thus discriminating against defendant, does not state facts sufficient to constitute a defense or counterclaim to an action on the contract between plaintiff and defendant.

REP.] April Term, 1914.

- 1a. If a public service corporation illegally discriminates in charging some customers a lower rate than others, these others cannot compel a grant of the illegal rate to them also.
2. Interest is not recoverable on open account when the contract does not expressly provide therefor.

Before DEVORE, J., and SHIPP, J., Greenville, November, 1912, and April, 1913. Affirmed.

Action by Paris Mountain Water Company against Camperdown Mills. From order of Judge DeVore overruling demurrer to answer, the plaintiff appeals. From judgment rendered by Judge Shipp both parties appeal. The facts are stated in the opinion.

The answer of defendant was as follows:

The defendant by this amended answer to the complaint herein:

1. Admits paragraph 1 of the complaint and denies so much of paragraph 4 as alleges that fifteen cents per thousand gallons was the minimum charge which could be made by plaintiff under the franchise from the city.

2. The defendant alleges that at the times referred to in the complaint the plaintiff was, and now is, engaged in the business of furnishing water to the city of Greenville for public purposes and to the people of said city and the territory adjacent thereto for domestic manufacturing and other purposes. That the plaintiff is and was a quasi public corporation and is engaged in serving the public in the matter of furnishing water as aforesaid. That under the laws of this State, it has the right to condemn lands for its corporate purposes and to exercise other valuable franchises given to public service corporations. That under the franchise granted by the city of Greenville and under the ordinances of said city it possesses the right to use the streets, alleys and other public places in said city for the purpose of maintaining its water main and discharging its duties as aforesaid.

3. That under the law it is bound to serve the public at reasonable charges not in excess of those set forth in its

franchise and without discrimination as between customers of the same class and that any discrimination between its customers is illegal and void.

4. The defendant admits paragraphs 2 and 3 of the complaint, but alleges that said contracts were made under the following circumstances: The defendant applied to the plaintiff for water to be used in the said mill and on Broad street, as stated in paragraph 3, and asked for the lowest price. That the agents for the plaintiff informed the defendant that fifteen (15) cents per thousand gallons was the lowest price charged any of its customers. That relying upon said assurance, and having no knowledge of any lower charge, this defendant entered into said contracts and continued to pay for water at the rate mentioned in said contract, to wit, 15 cents per 1,000 gallons, until some time in the spring of 1910, when defendant learned that the plaintiff was, during all of said time, furnishing other cotton mills situated in its territory and under similar conditions and using about the same quantity of water as this defendant, with water at the price of 10 cents per 1,000 gallons. That upon learning of this fact the defendant declined to make any further payments on a basis of 15 cents per 1,000 gallons, but offered to pay, and is still willing to pay, on a basis of 10 cents per 1,000 gallons, but the plaintiff declined to allow the defendant to settle on said basis.

5. This defendant alleges that plaintiff, by its contracts aforesaid, wrongfully and illegally discriminated against this defendant, charging it a higher rate than the rates charged other customers under similar circumstances and that said charges, in so far as they are in excess of the rate charged other customers of like character and using like quantities of water, are illegal and wrongful.

That the amount of the overcharge made by the plaintiff for the two quarters referred to in the complaint is one hundred seventy-nine and 42-100 (\$179.42) dollars. Denies the allegations of paragraph 9.

REP.]

April Term, 1914.

As a counterclaim this defendant alleges :

1. That the plaintiff herein is duly incorporated under the laws of the State of South Carolina, as a public service corporation and is engaged in the business of furnishing water for public manufacturing and other purposes to the city of Greenville and to the people of that city and adjacent territory. That it enjoys the right of eminent domain under the laws of this State and under the ordinances of the city of Greenville, certain valuable franchises, including the rights to use the streets, alleys and public ways for maintaining its water mains and the right to supply the citizens of Greenville with water.

2. That the plaintiff is bound under the laws and under the statutes of the State and under the ordinances of the city of Greenville, to furnish the users of water in its territory at a reasonable rate, not in excess of those rates referred to in the city ordinance and without discrimination as between customers of the same class.

3. That the defendant herein is engaged in the business of the manufacture of cotton goods in the city of Greenville and in its said business and for the use of its employees, it consumes a large amount of water, which water is supplied by the plaintiff corporation.

4. That the plaintiff, in violation of its legal duties, as aforesaid, did wilfully and wrongly charge and exact of this defendant a price for the water consumed by it during the years of 1908, 1909 and for the first quarter of 1910, at the rate of 15 cents per 1,000 gallons, aggregating two thousand eighty-four and 34-100 (\$2,084.34) dollars. That during the said period plaintiff was furnishing water for other cotton mills and manufacturing companies of the same class as the defendant and using practically the same amount of water, at a price of 10 cents per 1,000 gallons and that the plaintiff company, during this period, wrongfully represented to the defendant that 15 cents per 1,000 gallons was the lowest price at which it furnished water to its customers, and this

defendant made payment of the said price without any knowledge that the said statement of the plaintiff corporation was untrue, believing that the prices charged defendant were as low as those charged other mills. And the plaintiff did, in violation of its legal duties, charge this defendant and insist upon this defendant paying for water used during the second and third quarters of the year 1910, the price of 15 cents per 1,000 gallons.

5. That the defendant is entitled to recover of the plaintiff the money wrongfully exacted from it, as aforesaid, being the sum of six hundred ninety-four and 78-100 (\$694.78) dollars, this being the amount of the overcharge as aforesaid, together with interest from the time of payment, and for the further sum of two hundred and no-100 (\$200.00) dollars, as damages for the wrongful and tortious conduct of the plaintiff as aforesaid.

Wherefore, this defendant prays judgment against the plaintiff for the sum of six hundred ninety-four and 78-100 (\$694.78) dollars, with interest as aforesaid, together with two hundred and no-100 (\$200.00) dollars as damages.

The grounds of demurrer were as follows to both defense and counterclaim:

"The defendant admits that it contracted with the plaintiff to pay for water at the rate of 15 cents per 1,000 gallons, that it consumed the quantity charged by the plaintiff and that it paid therefor in full up to April 1, 1910; it demands a return of the difference between 15 cents per 1,000 gallons and 10 cents per 1,000 gallons, upon the ground that the plaintiff during the life of the contract furnished other cotton mills, situated in its territory and under similar conditions as the defendant, with water at the rate of 10 cents per 1,000 gallons and that the rate charged the defendant in excess of the rate charged said other cotton mills was illegal and wrongful. Such facts constitute no cause of action against the plaintiff, in the face of the defendant's

REP.]

April Term, 1914.

contract, for the reason that it is not alleged that the rate charged the defendant and agreed upon, was in excess of the rate authorized by law or unreasonable, and if a rate to furnish customers is less than the reasonable rate which the plaintiff may demand from all, the discrimination is at the plaintiff's expense and does not infringe on any right of the customers generally. A concession to a consumer does not fix a new schedule of rates for all.

The following was an additional ground of demurrer to the counterclaim:

The answer shows that the money the defendant now seeks to recover back from the plaintiff was paid by the defendant voluntarily, under a contract in writing signed by it without duress or legal compulsion, and an action will not lie now to recover it back.

Messrs. Cothran, Dean & Cothran, for plaintiff, cite: *In support of demurrer to answer*: 18 L. R. A. 1197; 27 L. R. A. (N. S.) 674; 21 L. R. A. 517; 52 So. 915; 12 Fed. 309; 58 L. R. A. 285; 29 S. C. 265; 5 Am. & Eng. Enc. L. 179. *Voluntary payments*: 90 S. C. 475. *Interest should be allowed, both the amount to be paid and time for payment being reasonably certain or capable of ascertainment*: 2 Speer 536; 2 Bailey, 374; 4 McC. 59; 3 McC. 498; 16 Am. & Eng. Enc. of L. 1013, 1014; 104 U. S. 771; 2 Speer 594; 10 S. C. 492; 16 S. C. 593; 34 S. C. 518; 47 S. C. 186; 49 S. C. 450. *Rates for taxpayers in city do not apply to consumers outside of the city*: 87 S. C. 566; 105 Fed. 1; 34 L. R. A. 525; 66 Fed. 140.

Messrs. Haynsworth & Haynsworth, for defendant, cite: *Discriminations in charges by public service corporations not tolerated*: 41 L. R. A. 240; 2 Wyman Pub. Ser. Corp., secs. 1290 and 1292; 61 S. C. 83; 127 S. W. 1068; 13 Am. Rep. 457; 9 L. R. A. 764; 48 Am. St. Rep. 729; 48 N. E. 101; 181 U. S. 100; 79 P. 1086; 41 L. R. A. 240; *distin-*

guish 87 S. C. 536. *Recovery of excess charges*: 22 Am. & Eng. Enc. of L. 609; Parsons Contracts, sec. 466; 9 L. R. A. 764; 49 S. C. 284.

July 20, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

The following statement appears in the record:

"This action was instituted in the Court of Common Pleas for Greenville county, on April 16th, 1911, for \$224.10, with interest from July 1, 1910, and for \$314.16, with interest from October 1, 1910, on account of water furnished the defendant by the plaintiff, during the period beginning April 1, 1910, and ending September 30, 1910, under written contracts dated, respectively, October 1, 1904, and February 25, 1907.

On March 15, 1912, the plaintiff served upon the defendant, written notice of demurrer to the answer and counterclaim, hereinafter set out, which demurrer was heard by Judge DeVore at November term, 1912, and overruled. From the order overruling the demurrer the plaintiff gave notice of appeal.

The cause then came on for trial upon the merits, before Judge Shipp and a jury at April term, 1913. At the close of the testimony, upon plaintiff's motion, Judge Shipp directed a verdict in favor of the plaintiff, for the amount of two water bills, \$224.10 and \$314.16, total \$538.26, but refused to allow the plaintiff interest as claimed.

Upon the verdict thus rendered, the plaintiff duly entered up judgment, and from that judgment in due time, both parties have appealed, the defendant contending that the plaintiff was entitled to nothing, and the plaintiff contending that it was entitled to interest as claimed, in addition to \$538.26."

In its answer the defendant alleges that "the plaintiff was, and now is, engaged in the business of furnishing water to the city of Greenville for public purposes, and to the people

REP.]

April Term, 1914.

of said city, and the territory adjacent thereto, for domestic manufacturing, and other purposes. That the plaintiff is and was a quasi public corporation, and is engaged in serving the public in the matter of furnishing water as aforesaid. That under the laws of this State, it has the right to condemn lands for its corporate purposes, and to exercise other valuable franchises, given to public service corporations. That under the franchise granted by the city of Greenville, and under the ordinances of said city, it possesses the right to use the streets, alleys and other public places in said city, for the purpose of maintaining its water main, and discharging its duties as aforesaid.

That under the law, it is bound to serve the public at reasonable charges, not in excess of those set forth in its franchise and without discrimination as between customers of the same class, and that any discrimination between its customers, is illegal and void."

The defendant also alleged, by way of defense, that other mills similarly situated were, at the time of the contracts between the plaintiff and the defendant, being supplied with water, at the rate of 10 cents per 1,000 gallons, without the knowledge of the defendant, and contrary to the statements of the plaintiff; and, that it should not, therefore, be required to pay a higher rate than others.

Defendant also set up a counterclaim for excess charges, paid since 1907.

Section 7 of the franchise under which the plaintiff was operating, contains the provision, that it shall not charge rates exceeding the amount therein specified, and that no water shall be supplied to any customer per year, for less than 15 cents per 1,000 gallons, where the supply exceeds 10,000 gallons per day.

The first question that will be considered, is whether there was error on the part of his Honor, the presiding

1 Judge, in overruling the demurrer to the defense set up in the answer.

It is not contended that the contracts between the plaintiff and the defendant, were unauthorized or rendered illegal by reason of any provision in the plaintiff's franchise. There is no view under which the claims of the defendant can be sustained. In the first place, if the provision of the water company's franchise, that it should not charge a rate less than 15 cents per 1,000 gallons, has no application to mills outside the limits of the city, then it could not be successfully contended, that contracts with those mills would be discriminatory. But even if the provisions of the franchise, are alike applicable to the mills in and outside the city, nevertheless, the defendant is not entitled to the relief which it seeks. The remedy where there has been an illegal discrimination, in the administration of powers conferred by a municipality, is not by extending to others, the benefits arising from such discrimination, thereby increasing the number of those violating the law, but to resort to the remedies which the law provides, for preventing the discrimination altogether. The defendant is practically asking the Court, to allow it to be placed in the same category as those mills, that, it alleges, have entered into unlawful contracts, in order that it may receive benefits to which, it alleges, others, in like plight, are not entitled.

While the facts in *Fuller v. Payne*, 96 S. C. 471, 81 S. E. 176, are quite different from those in the present case, the principles upon which that case was decided, are conclusive of the question under consideration. In that case the Court said:

"There is a marked distinction, where the discriminatory classification is created by the act making the appropriations, and when such classification arises from the manner, in which the provisions of the statutes are administered by the fiscal agents, in assessing property subject to taxation. Conceding that the classification mentioned in the complaint would have rendered the statute, under which the appropriation was made, null and void if authorized by the legislature,

REP.]

April Term, 1914.

it cannot be successfully contended that it had such effect, when adopted by the fiscal agents of the county.

It is not alleged in the complaint, that the statute under which the taxes were collected was unconstitutional, and, therefore, null and void, nor that the fiscal officers assessed her property at more than its true value; nor that the rate or per centum upon which her taxes were collected, exceeded that which the law prescribed; nor that in dealing directly with her property, there was a failure to comply with any requirements of law. We, therefore, start out with the indisputable proposition, that the taxes paid by the plaintiff did not exceed the proportionate amount which it was her duty to pay, and consequently was not illegal. She, however, contends that it would be inequitable, not to refund the taxes paid by her, on the ground that other taxpayers owning property similar to hers, were not required by the fiscal authorities to return it, for taxation, and that thereby a greater burden was imposed upon her, than her proper proportion of taxes. In the first place, it cannot be successfully contended, that the taxes paid by her, on the property described in the complaint, should be refunded, as, in that event, she would occupy towards the owners of similar property throughout the State who had paid taxes thereon, practically the same relation which she now occupies towards those in Greenwood county, who have not returned their property for taxation. It was inequitable and unjust for them to refuse to return their property for taxation, and pay their proportionate part of the taxes; and it would be equally inequitable and unjust for her, to be excused from paying her proportion of the burden imposed upon the taxpayers. Two wrongs do not make a right."

The demurrer should, therefore, have been sustained.

The next question that will be determined, is,

- 2 whether there was error in the instruction to the jury, that the plaintiff was not entitled to interest.

The contracts between the plaintiff and the defendant, were substantially as follows: •

“The water company agreed to supply water to the mill known as Camperdown Mills, also for 13 single tenement houses and 24 double tenement houses occupied by operatives of said mills at the rate of 15 cents per 1,000 gallons, minimum \$15 per quarter. The contract was to expire on January 1, 1911, but to continue in force from quarter to quarter, unless 30 days notice of termination be given by either party. The quarter days were fixed as the first days of January, April, July, and October. The water rents were payable on said quarter days. Delinquency of 30 days justified cutting off water. Water to be measured by meters supplied by water company. Defendant agreed to the terms stated.”

The contracts did not provide for interest, and there was no testimony tending to show, that the parties had agreed as to the amount that was due.

These views practically dispose of all questions presented by the exceptions.

It is the judgment of this Court, that the judgment of the Circuit Court be affirmed.

8911

SULLIVAN v. KING *ET AL.*

(82 S. E. 408.)

MAGISTRATES. SUSPENSION OR REMOVAL. APPOINTMENT TO FILL VACANCY.

1. An appointment to fill a vacancy supposed to have been created by the suspension or removal of a magistrate is null and void, where no vacancy existed.
2. The attempted suspension or removal of a magistrate from office, without having afforded him an opportunity to be heard on the charges assigned as cause for his removal, is ineffective and creates no vacancy which can be filled by a new appointment.

REF.]

April Term, 1914.

3. Where a magistrate served to show cause before the Governor why he should not be suspended from the office made return in person, and, with his attorney, attended the hearing before the Governor, who announced that notice would be given before any further action was taken, and the Governor subsequently called a meeting of the members of the House of Representatives for the county of the magistrate, without notice to the magistrate or the senator from the magistrate's county, and at the meeting the magistrate was suspended, the action of the Governor was void.

Before RICE, J., Anderson, December, 1913. Reversed.

MANDAMUS. Proceedings on petition by A. B. Sullivan for writ of mandamus to compel J. Mack King, T. M. Vandiver and J. M. Dunlap, county supervisors and the county board of commissioners of Anderson county, and C. W. McGee, county treasurer, of said county to pay the salary of A. B. Sullivan, claiming to be a magistrate for said county. B. F. Wilson being made a party respondent to the proceedings. From decree adjudging the payment of the salary to the petitioner, B. F. Wilson appeals.

The facts are stated in the opinion.

Messrs. Bonham, Watkins & Allen and Quattlebaum & Cochran, for B. F. Wilson, appellant, cite: Magistrate entitled to notice and hearing before removal: McDowell v. Burnett, 92 S. C. 469; 212 Fed. 275; Civil Code, sec. 1391, 694. Distinction between suspension and removal: 92 S. C. 483; 3 L. R. A. 856; 29 Cyc. 1405. Suspension creates inter regnum but no vacancy: 23 A. & E. Enc. of L. (2d. ed.) 451; 24 Id. 462, note; 27 Id. 558, 559; 72 Texas 629; 19 Neb. 444. Suspension creates no vacancy which can be filled without express grant of power: Const. 1895, art. IV, sec. 22; Code, sec. 1391; 92 S. C. 399.

Mr. J. M. Paget, for petitioner-respondent.

Mr. Kurtz P. Smith, for county commissioners and county treasurer, respondents.

July 20, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This is an appeal from an order of the Circuit Court, requiring the fiscal officers of Anderson county to pay the salary of the petitioner, on the ground that he was the duly appointed magistrate during the time mentioned in his petition.

The petition alleges, that on the — day of April, 1913, Magistrate B. F. Wilson, holding the office of magistrate at Anderson, S. C., was duly suspended from his office by the Governor of the State of South Carolina, after due notice and hearing, and is still suspended from said office.

That on the 23d day of April, 1913, your petitioner was appointed and commissioned by the Governor as a magistrate at Anderson, S. C., in the place of the said B. F. Wilson, so suspended.

The answer of B. F. Wilson to the rule to show cause contains the following allegations:

(1) "That he was appointed to the office of magistrate, at the city of Anderson, S. C., by Governor Blease, by and with the advice and consent of the Senate, and duly confirmed, and was commissioned on the 8th day of February, 1911.

(2) "That no successor to this respondent as magistrate at Anderson, S. C., has ever been appointed, by and with the advice and consent of the Senate, and this respondent at the time set forth in the petition, was holding said office, and still holds the same, under the appointment made by the Governor of this State on February 8th, 1911, as hereinabove set forth.

(3) "That respondent has never been legally suspended from the office of magistrate. That on March 8th, 1913, respondent was served with a rule to show cause before the Governor, on March 13th, 1913, why he should not be suspended from the office of magistrate for Anderson county,

REP.]

April Term, 1914.

and that he made return to said rule, and in person, with his attorney, attended the hearing of said return before the Governor. That when the return had been heard, the Governor took the papers and stated to respondent's attorney, in the presence of respondent, that before any further action was taken he should have notice. That, thereafter, to wit, on April —, 1913, the Governor called a meeting of the members of the House of Representatives for Anderson county, which meeting was held at Anderson, S. C., on April —, 1913, but no notice was given to the senator from Anderson county of said meeting, nor was said senator present at said meeting, nor was he given any opportunity to be present; that no notice was given to the respondent, nor his attorney, of said meeting, and neither the respondent, nor his attorney were present at said meeting, nor were they, or either of them, given an opportunity to be present. That at said meeting, of which respondent had no notice, the Governor heard and received charges against this respondent, the exact nature of which is to this respondent unknown, as they have never been disclosed or submitted to him by the Governor, for any reply or defense respondent might have to make to said charges, and at said meeting the Governor submitted to the said members of the House of Representatives the question of the suspension of respondent as magistrate, stating that he would carry their wishes into effect; and thereafter, in order to carry out their decision, addressed and sent respondent the two letters which are hereto attached, marked exhibits A and B, and the Governor has refused to give the respondent a further hearing."

When the case was called for a hearing before his Honor, the Circuit Judge, the record shows that the following took place:

"At this hearing and before it was commenced, the attorneys for B. F. Wilson inquired of the other attorneys in the cause, in the presence of the Judge, whether they desired to traverse the facts, or any of them, which were stated in the

return of the defendant, B. F. Wilson. To this inquiry said attorneys stated to the Court that they did not traverse any of the facts set forth in the return of the defendant, B. F. Wilson, but that it was in the nature of a demurrer to same. Thereupon the matter was heard by his Honor, Judge Rice, at which said hearing all statements of fact in the said return of B. F. Wilson were deemed and taken as true."

The office of magistrate at Anderson, S. C., was not vacant at the time the petitioner alleges that he was appointed and commissioned by the Governor. *State v. Bowden*, 92 S. C. 393, 75 S. E. 866.

The Governor has not the power to suspend a magistrate without first giving him a reasonable opportunity to be heard on the charge of misconduct. *McDowell v. Burnett*, 92 S. C. 469, 75 S. E. 873.

The facts stated in the return of B. F. Wilson, to the rule to show cause, are sufficient upon their face to show that he was not afforded a reasonable opportunity to be heard on the charges of misconduct in office; and, the agreement of counsel hereinbefore mentioned, is to the effect that the facts alleged in said answer should be deemed and taken as true. Therefore, the action of the Governor, purporting to suspend the incumbent, Wilson, and the appointment of the petitioner, A. B. Sullivan, in his place were null and void.

These conclusions practically dispose of all other questions presented by the exceptions.

It is the judgment of this Court, that the judgment of the Circuit Court be reversed, and that the petition be dismissed.

REP.]

April Term, 1914.

8912

BRAMLETT v. SOUTHERN RAILWAY CO.

(82 S. E. 501.)

MASTER AND SERVANT. FEDERAL EMPLOYERS' LIABILITY ACT. FEDERAL SAFETY APPLIANCE ACT. CHARGE. ASSUMPTION OF RISKS.

1. Where a switchman jumped at a footboard on the tender of an engine, missed his footing because of the defective condition of the board, and was thrown down and injured, and during the trial defendant's counsel referred to the board as a "footboard" and "running board" interchangeably, he was not entitled to a ruling that the accident was not within the Federal Employers' Liability Act, because such act forbids the use of defective "running boards" and that the board in question was not a running board, but a footboard.
2. Where a switchman was injured while making up an interstate train, his right to recover depended on the Federal Employers' Liability Act, which superseded all provisions of the State Constitution relating to assumed risk.
3. Where, in an action for injuries to a switchman in making up an interstate train, the Court adjudged that the Federal Employers' Liability Act alone governed the case and that in the particulars mentioned in the statute assumed risk was no defense, remarks of the Court concerning the general law of assumed risk were not erroneous, as, in effect, adjudging that the defense of assumed risk was eliminated whether the defect causing the injury was a violation of the federal act or not.
4. Where plaintiff, a railroad switchman, while making up an interstate train, jumped at a defective board on the tender of the engine, missed his footing, and was injured, whether the board was a "running board" within the Federal Employers' Liability Act forbidding the use of defective "running boards," was for the jury.

Before RICE, J., Greenville, November, 1913. Affirmed.

Action by A. B. Bramlett against Southern Railway Company. From judgment for plaintiff, defendant appeals. The facts are stated in the opinion.

The following requests to charge were submitted to the Court, and were read and referred to in the charge below set out:

Plaintiff's requests to charge:

I. "I charge you that under the acts of Congress, if you find that the plaintiff was employed by the defendant in car-

rying on interstate commerce, and if the plaintiff was injured while so engaged by the defendant on carrying on interstate commerce, and if such injury resulted in whole or in part from the negligence of any of the officers, agents or employees of the defendant, or if such injury resulted by reason of any defect or insufficiency in the appliance furnished by the defendant as charged, and if such defect or insufficiency was due to the negligence of the defendant, then plaintiff would be entitled to recover damages against the defendant in this action, and the defense commonly known as the fellow servant doctrine would not avail to relieve the defendant from liability to the plaintiff; and, if under the circumstances herein stated, the jury find that the plaintiff was guilty of any negligence on his part which contributed to the injury as a proximate cause thereof, without which the same would not have happened, such contributory negligence would not constitute a defense, and would not relieve the defendant from liability to the plaintiff, but would only operate to diminish the damages in proportion to the amount of negligence attributable to the plaintiff.'

II. "If the jury find that there was any defect or insufficiency in the appliance furnished by the defendant to the plaintiff as charged, and if the plaintiff was at the time employed by the defendant while engaged in carrying on interstate commerce, then I charge you that under the acts of Congress no contributory negligence on the part of the plaintiff, and no assumption of risk on the part of the plaintiff would operate to relieve the defendant of liability to the plaintiff, as the acts of Congress expressly declare that if injury result to an employee by reason of the negligence of the carrier engaged in interstate commerce in furnishing defective or insufficient appliances, then in the case of injury to an employee by reason of such defective or insufficient appliances, negligently furnished, the carrier will not be excused from liability and from damages by reason of any

contributory negligence or any assumption of risk on the part of the employee.

III. "Under the Constitution of the State of South Carolina, if the plaintiff was injured by reason of the negligence of a person having a right to control or direct the services of the plaintiff, defendant would not be excused from liability by reason of the doctrine of fellow servant. And, further, under said Constitution of South Carolina, if the plaintiff was injured by reason of any defective or unsafe appliance furnished him, knowledge of such defective or unsafe condition of the appliance would not be a defense to this action, as to the plaintiff, unless the jury should find that the plaintiff were an engineer or a conductor and operating cars or a locomotive voluntarily.

IV. "If the jury find that what the testimony refers to as the 'footboard' is a 'running board,' and if such running board or footboard was defective and insufficient by reason of defendant's negligence, and if such condition of the footboard contributed to plaintiff's injury, then, in such case, no contributory negligence or assumption of risk by plaintiff can constitute any defense.

"See sec. 2 of Safety Appliance Act of 1910."

The defendant's requests to charge:

I. "A master is not an insurer of the absolute safety of his appliances under all circumstances. All that the law requires of him is to make and keep them reasonably safe with reference to the ordinary and expected use thereof. If an appliance is shown to have been unsafe only by reason of the unusual, unexpected and negligent use of it by an employee, the master cannot be charged with a breach of his duty in respect thereto.

II. "Even if the jury should conclude from the evidence that the footboard was worn and beveled on the edge and that the supports were bent so as to incline the footboard from a horizontal position, still if they conclude from the

evidence that it was nevertheless reasonably safe for the ordinary and expected use of it by employees, and that it is shown to have been unsafe only by reason of the unusual, unexpected and negligent use of it by the plaintiff, the railroad company cannot be charged with a breach of its duty in having said footboard in the condition described.

III. "If the jury believe from the evidence that the plaintiff was directed or undertook to throw the switch after the engine had passed on to the main line to back up to the rear of train 36 for the purpose of detaching the diner, and that he knew of such contemplated movement of the switch engine and the purpose thereof, it was his duty to exercise ordinary care to protect himself from injury by such movement of the engine.

IV. "The specific acts of negligence charged in the complaint are not breaches of any federal statutory duties (and for that reason the defendant is entitled to the full measure of the defense of assumption of risk, if made out to your satisfaction).

V. "An employee is held to assume the ordinary dangers of the occupation in which he is engaged, and also those risks and dangers which are known or so plainly observable that he may be presumed to know of them.

VI. "If the jury believe from the evidence that the plaintiff's injury was due to the risks of his employment assumed by him, I charge you that the plaintiff is not entitled to recover a verdict for any amount.

VII. "This action is to be determined by the provisions of the Employers' Liability Act of Congress, which supersedes all State regulations of the subject.

VIII. "If the jury believe from the evidence that the plaintiff himself selected the course of action which led to his receiving the injury complained of, he must be regarded as having taken upon himself the responsibility for any personal harm which he may suffer as a proximate cause of the selection thus made.

Rep.]

April Term, 1914.

IX. "If the jury believe from the evidence that the plaintiff of his own accord stood between the rails and attempted to mount the step as the engine approached him; that such a course was not the ordinary or expected course under the circumstances; that such course was contrary to the rules of the company; and that his injury was the proximate result of such adopted course; the plaintiff is held to have assumed the risk of injury, even though it may be proved that the step was worn, and beveled and the irons supporting it bent to such an extent as to make it unsafe to mount the step under those circumstances.

X. "This action being maintained under the Federal Employers' Liability Act, I charge you that since Congress has legislated upon the subject and since the act recognizes the defense of assumption of risk except where the injury results from the breach of some duty imposed by federal statute, the plaintiff cannot invoke the provisions of the Constitution of South Carolina to the effect that knowledge of any defect in machinery, ways and appliances shall be no defense; but the defendant has the right to invoke such defense in every respect except in the instances referred to, which do not exist in this case.

XI. "Whatever in the Constitution of South Carolina which militates against the defense of assumption of risk is superseded by the Employers' Liability Act of Congress."

The Judge charged the jury as follows:

"Now, Mr. Foreman and gentlemen, this case comes up to you for final determination. The plaintiff must make out his case by the preponderance or greater weight of the evidence. That is the rule. He comes into Court and alleges certain things and he bases his case upon his allegations. He asks damages.

"Now, then, the defendant comes into Court and denies it. Then, the burden is upon the plaintiff to make out his case by the preponderance or greater weight of the evidence.

Now, by preponderance or greater weight of testimony, is not meant, Mr. Foreman and gentlemen, the greater number of witnesses testifying to one particular fact or state of facts. I mean, not necessarily the greater number of witnesses, but it is the weight that you attach to what those witnesses say. It is your privilege to believe what one witness says, if you see fit to do so, and not believe what a dozen other witnesses say when those dozen other witnesses flatly contradict the one witness. It is the weight that you attach to what the witnesses say. Because what you are here to find out, Mr. Foreman and gentlemen, is to find the truth, is to get at the truth, and if you believe that one witness swears the truth and that a dozen other witnesses are not swearing the truth, then it is your right and privilege to believe that one witness.

Now, Mr. Foreman and gentlemen, this plaintiff, Bramlett, comes into Court in this case and says that on the morning of January 20th, 1912, that he was then in the employ of the defendant, the Southern Railway Company, as a brakeman, working on the yards at Greenville, and while engaged in his duties as a brakeman on the yards here in Greenville that he was run over by the tender which was operated by the servants, agents and employees of the Southern Railroad Company, and that he was injured, and that this injury was received through the carelessness and negligence of the defendant, acting through its servants, agents and employees.

"Now, then, Mr. Foreman and gentlemen, the particular allegations of negligence and carelessness which he sets up here—and if he recovers he must recover on these allegations, because he cannot go outside of what he alleges in his complaint to bolster up his case or to make out his case. Whatever he charges in the complaint must constitute the basis of his action and he must stand or fall by those allegations.

REP.]

April Term, 1914.

"He says that plaintiff, that is, Bramlett, sustained his injury by reason of the negligence, carelessness and recklessness of the defendant in starting said engine or locomotive suddenly backwards without any signal from the plaintiff. He says that he was back of the engine and tender, and that it was carelessness, negligence and recklessness in the engineer in starting it backwards towards him without any signal from him and without giving any notice to the plaintiff that said locomotive was about to be moved. Then, he says further, in starting said locomotive suddenly and so swiftly and in negligently, carelessly and recklessly failing to furnish plaintiff with a safe and suitable place and appliance with which to do the work, to wit, a footboard, which was badly worn and beveled on the edge, with a broken backstop supported by irons or stirrups, which had become bent so as not to be horizontal with the ground; and that by reason of the carelessness, negligence and recklessness of the defendant in these particulars which he has pointed out to you and which I have just read to you, plaintiff has been mutilated for life and deprived of one of his feet, has suffered great pain and anguish, his earning capacity has been greatly reduced, and for this he claims damages in the sum of fifteen thousand dollars.

"Now, Mr. Foreman and gentlemen, I haven't gone over all this complaint and stated it to you exactly, but just roughly I have indicated the plaintiff's contention, and that there may be no misunderstanding about what he claims, why you will have the complaint with you, and I want you to read it over. You have heard the evidence and by reading it over, why you will get his full complaint.

"Now, Mr. Foreman and gentlemen, the action, as you will notice, is based on negligence. Now, whenever a plaintiff comes into Court and bases his action upon negligence, there are certain things he must prove.

"The first is a duty due and owing to the plaintiff by the defendant to protect him from the injury complained of.

That is, the injury that he suffered at that time. That there was a duty owing at that time by the defendant to protect him from the injury.

"The second is, a failure to perform that duty.

"And the third is, that by reason of that failure to perform that duty he was injured.

"Now those are the three things necessary to make up a case where negligence is charged.

"Now, what is negligence? Well, ordinarily, we say it is carelessness, but we have had numerous definitions of it by the Courts, and I will have to try to give you those definitions. It is the want of ordinary care. It is the want of due care.

"Well, now, what is due care? Due care is that want of care which a man of ordinary care and prudence would have exercised under a given state of facts. Of negligence, we might say, is this: It is failing to do that which under a given state of circumstances a man of ordinary care and prudence would have done, or the doing of something, some act, which a man of ordinary care and prudence under the circumstances would not have done. What might be negligence under one state of facts, Mr. Foreman and gentlemen, as you can readily see, under an entirely different state of facts would not be negligence. It all depends upon the surrounding circumstances at the time the act is done.

"As I have said once or twice before, a man could go out in the country where there is no probability of a person being in sight, and he has a good level road and a fine automobile, he might run sixty miles an hour and it wouldn't be negligence. But let him go through the streets of Greenville at sixty miles an hour and that would be a different proposition. The circumstances surrounding the case would be entirely different. Therefore, when we come to speak of the question of negligence we always take into consideration the circumstances surrounding the doing of the act.

"Now, Mr. Foreman and gentlemen, this action—the action in this case is brought under what is commonly called

REP.]

April Term, 1914.

the Employers' Liability Act. That is, it is a federal statute, an act passed by Congress, and the plaintiff must stand or fall under the provisions of that act. If he makes out his case under that act, then he is entitled to recover. If he fails to make out his case under that act, then he is not entitled to recover.

"Now the complaint, Mr. Foreman and gentlemen, is that this engine and tender was engaged in interstate commerce, or engaged in making up a train which had to pass through one State into another State. And, as I understand from counsel, there is no contention about that. That the work that he was engaged in was interstate commerce, and, therefore, he has brought his action under this act of Congress commonly known as the Employers' Liability Act. And he must make out his case under that act, or he must fail to do so.

"Now, without going into the whole of the act, I want to read a part of it here to you.

"This is an act of 1908. You heard it discussed yesterday at great length.

"'Every common carrier by railroad engaged in commerce between several States and Territories, or between any States and territories, or between the District of Columbia and any of the States and Territories, and so forth, shall be liable in damages to any person suffering injury while he is employed by such carrier of such commerce.'

"(Reading same further.)

"Now this action is brought under this act of 1908, and they charge negligence here in the particulars which I have read. And in addition to the particulars which I have read to you, you will find in this complaint that they charge defective appliances and an unsafe place in which to work.

"Now, Mr. Foreman and gentlemen, the master is bound to furnish his servant a safe place in which to do his work, and, further, to furnish him safe appliances with which to do his work. Now, when I say a safe place in which to work, I don't mean that it must be an absolutely safe place,

but reasonably safe, having regards to the kind of work he is engaged in. Because there are some kinds of work, Mr. Foreman and gentlemen, that in the very nature of itself is a dangerous piece of work to do. Now, the master must furnish a reasonably safe place in which his servant is to work, considering the nature of the work which he is to do. Further, he must furnish reasonably safe appliances with which to do the work. That doesn't mean that it must be an absolutely safe appliance or appliances, because there are contingencies in every kind of work which no human foresight can guard against. In such case the master is not liable, if he has furnished a reasonably safe place to work and reasonably safe appliances with which to work.

"Now, when the master has done these things, Mr. Foreman and gentlemen, then it is the duty of the servant to use ordinary care in doing his work and ordinary care in using the reasonably safe appliances furnished him by the master. The law lays that upon the servant.

"Now, Mr. Foreman and gentlemen, under our State laws and the decisions of our Supreme Court up to this time—in fact, under the common law, there is something vague and indefinite that you never understand. I don't know that we lawyers understand it entirely, but it is the law which has been recognized for hundreds and hundreds of years by England and in this country. And the common law is of force in this State.

"Under the common law, where a servant was injured through the carelessness or negligence of a fellow servant, then he could not recover, but this act of Congress changes that. As you probably heard me read, it says this:

" 'If it results in whole, or in part, from the negligence of any of the officers, agents or employees of such carrier.'

"Therefore, it don't make any difference whether he was a fellow servant or not. If he is injured, why he can recover under this act. He is not cut out. But the act says this:

REP.]

April Term, 1914.

“That the fact that the servant may have been guilty of contributory negligence shall not bar a recovery.’

“Now in this State, Mr. Foreman and gentlemen—I mean under our statute law—that if the contributory negligence of the servant, or the person injured, was the proximate cause of his injuries, then he cannot recover. That is the law in this State, but under the federal act that thing has been changed, so that his contributory negligence doesn’t defeat his recovery.

“Now, when I say proximate cause, I don’t think that in this case it is necessary for me to go very extensively into that. It means the direct cause, the immediate cause. But in this case here, under the federal statute, it says this:

“The jury must diminish the amount of damages which he has received in direct proportion to the degree of negligence which they find him guilty of.’

“Now, to try to illustrate that. Suppose that he wasn’t negligent at all, and you would find that he would be entitled to recover a certain amount. Now, then, suppose you say, well, I believe that two-thirds of that thing was due to his own negligence. In other words, a third of it was his negligence. Then you cut that amount two-thirds, because the act says he is charged with that much of that amount on account of his negligence. Or, suppose you found that, well, now, if he wasn’t negligent at all, and it was due entirely to the negligence of the defendant, he would be entitled to a certain amount, but we believe that one-half of his trouble was caused by his negligence. In other words, we find that one-half of his negligence went to make up the whole trouble, then you would cut down that amount by one-half.

“Now, Mr. Foreman and gentlemen, the rest of what I have to say to you is covered by these requests to charge, and I don’t like to repeat too much, so I am going to charge you these requests and explain them to you and give you the rest of the law.

"Well, there has been a great deal of disagreement about the law of this case, and it is not unusual or unexpected. These are new acts, passed in 1908, and the Courts haven't yet had time to pass upon every phase of the act and hammer it out, and say this is the law about this thing and that is the law. So the lawyers differ, as would naturally be expected, as to the force and effect of this act of 1908. And, as it very often happens, I can't agree in toto with either one of the attorneys in this case.

"The plaintiff asks me to charge you this (reading requests):

I. "Well that is good law. I have practically charged you that already.

"And right here, Mr. Foreman and gentlemen, I want to say this, that if there is no negligence shown on the part of the defendant whatsoever, then that relieves the defendant entirely, because the basis of this action is negligence. If the defendant was only negligent to a small degree and the greater portion of the trouble or negligence was due to the plaintiff, then you must reduce the verdict accordingly. In other words, you must divide it up between them in proportion, the responsibility that rests on each party.

II. "You remember, gentlemen, that assumption of risk was argued pro and con here yesterday by the attorneys. I charge you that. That is good law.

III. "Now, gentlemen, the third request—I refuse that. My view of this case is that the act of Congress covers the whole subject to the exclusion of any State laws, whether it is constitutional or statutory, and, further than that, it does cover the whole of it. Therefore, this third request to charge I refuse. I may be wrong in my construction of this act. If I am, I certainly hope, gentlemen, you will take it up to the Supreme Court and make it straight.

IV. "Well, I charge you that, Mr. Foreman and gentlemen. What is known as the Safety Appliance Act of Congress requires the railway company to furnish their cars with safe running boards, and it is for you to determine

REF.]

April Term, 1914.

whether or not the footboard mentioned in this complaint—you have heard the evidence on that—is the same as what is known as the running board on a car. And I charge you, Mr. Foreman and gentlemen, that the word car as used there would apply to a tender also. And then, it is for you to determine as to whether or not under the evidence the running board mentioned is the same as footboard mentioned in this complaint. If you find that it is, then there is a further provision in this act: *Provided*, That no such employee who may be injured or killed shall be deemed to have been guilty of contributory negligence in any case where the violation by such common carrier or any such negligence for the safety of employees contributed to the injury or death of such employee.

“That is to say, that where one of these safety appliance acts has been violated by the railway company, then the railway company cannot set up any contributory negligence on the part of the employee who might be injured or killed.

“Now the railroad company is not allowed to set that up as a defense to that extent, whereas, in the other act I have read, it can set it up at least in mitigation of damages. That is the damages as I said awhile ago.

“Now, gentlemen, I will try to get along with this and turn it over to you, because I know you are getting worried. But you and I are bound to be as patient as we can in trying this case and to do the best we can.

“Now, the defendant requests these charges:

I. “That is good law, Mr. Foreman and gentlemen. I have charged you that already. I charge you that again.

II. “Well, I charge you that, Mr. Foreman and gentlemen. It is practically repeating over to you again what I said, that it must be reasonably safe. Now, whether or not it was used in an unusual, unexpected and negligent manner is a question which you are to determine. And don’t understand by my charging you this that I am intimating that any such thing took place, because those are absolutely—those are questions absolutely for you.

III. "I charge you that. There ain't any question about that.

IV. "Now, Mr. Foreman and gentlemen, I cannot charge you that. But if you determine that the running board mentioned in the Safety Appliance Act, which I have been talking about to you, is the same thing as the footboard mentioned in this complaint, then they are charged with a breach of the federal statutory duty. But if you find that the running board, what is known as the running board on a car, and this footboard are not the same thing, but mean different things, then, Mr. Foreman and gentlemen, they are not charged in that case with any federal statutory duty.

V. "I charge you that.

VI. "Now, I charge you that, with this modification: If you find that it was due solely to the risks of his employment, the ordinary risks of his employment, then he cannot recover.

VII. "I think that is good law. I charge you that.

VIII. "Now I refuse to charge you that, Mr. Foreman and gentlemen. It is for you to say whether he was guilty of negligence, and whether or not his course of action was in the line of his duty.

IX. "Well, I refuse to charge you that.

"Now, Mr. Foreman and gentlemen, whether or not he was in between those two rails is a question for you, and what he was doing there at the time, whether he was in the discharge of his duties, is a question for you to determine. Whether or not he was trying to step upon that step to try to save himself from being run over is a question for you to determine, and whether or not he was discharging his duties at the time is a question for you to determine. And I am not going to undertake to say whether or not that was such negligence as would defeat entirely his recovery. Because, you have heard the position he was in, the testimony on both sides as to what he was doing, and I am going to leave that entirely to you to determine.

REF.]

April Term, 1914.

X. "I refuse that.

"Now, gentlemen, to explain what I think about that. As I said at the start, I think this act covers the whole thing.

XI. "Whatever in the Constitution of South Carolina which militates against the defense of assumption of risk, is superseded by the Employers' Liability Act of Congress.

"Under the common law, which is of force in this State where a servant works with defective appliances, so defective that there will be danger to work with them, then he assumes the risk—if he finds out or has knowledge that these appliances are dangerous to work with, that they are defective, then the law implies a contract between him and his employer that he shall assume the risks of any hurt or damage from those defective appliances.

"Now, then, under this act of Congress, in section five, if the railroad people were to make a contract in writing, that would not exempt them from the provisions of this section which I have read to you about defective appliances, and such a contract would be null and void and of no effect so far as relieving them from the consequences of a violation of this section as to one using defective appliances and machinery. And, Mr. Foreman and gentlemen, if in the one case it is only an implied contract which arises from the use of defective appliances, and in the other case a written contract wouldn't hold good nor relieve them, then I fail to see the philosophy or the good sense in saying that an implied contract would relieve them from the consequences under this act; and it doesn't, in my judgment.

"(Reading section five of same act.)

"Now, then, if they couldn't do it by written agreement or written contract, certainly they couldn't do it by any implied contract which would arise between them and the employees.

"Now, that is my view, and I charge you that is the law. I may be mistaken, but the Supreme Court can correct me if I am wrong. I think when Congress took possession of

this subject and passed this act that it was for the protection of the employees, and I think that they have covered practically the whole subject.

"If you find for the plaintiff under the principles I have tried to explain to you, why you would find him such an amount as would compensate him for the injuries received, for his suffering and his diminished earning power, and such an amount as would compensate him for the loss of his leg and the injuries which he received, generally. Of course, that is based upon the assumption that the defendant is liable.

"Now, in writing out your verdict, just write it out in words and say, we find for the plaintiff so much money, or we find for the defendant. And write out the amount you find for the plaintiff, if you find anything, writing it out in words and not in figures, and sign your name as foreman.

"Now, gentlemen, I haven't gone into any extensive explanation of the defense set up here, but I will say this, Mr. Foreman, that the defendant denies all of this thing and puts the plaintiff on proof, and the plaintiff must prove his case. The defendant sets up that he was guilty of contributory negligence. I have explained to you what contributory negligence is. Also they set up the assumption of risk, and I have explained that.

"Take the record."

Messrs. Cothran, Dean & Cothran, for appellant: Federal law exclusive, and supersedes all State law upon this subject: 223 U. S. 50, 51, 53; 187 U. S. 146; 226 U. S. 505; 90 S. C. 517; 173 Fed. 527; Doherty, Liability R. R. to Interstate Employees, p. 65; 229 U. S. 119; 206 Fed. 868; 73 Fed. 679; 129 Pac. 336; 210 Fed. 120; 233 U. S. 492. Law of assumption of risks: 80 S. C. 232; LaBatt M. & S., sec. 338; 2 S. E. 659; 17 Fed. 882; 45 Fed. 673.

Mr. J. J. McSwain, for respondent: General charge in connection with defendant's fifth and sixth request gave

REP.]

April Term, 1914.

defendant benefit of defense urged: 78 S. C. 384, 537, 352; 75 S. C. 390; 71 S. C. 156; 72 S. C. 411. *There was no request to charge proposition urged:* 73 S. C. 140; 76 S. C. 116; *Ib.* 207; 77 S. C. 399. *Tenth request was upon the facts and, therefore, properly refused:* See note on cases under Federal Employers' Liability Act, 47 L. R. A. (N. S.) 38. *General doctrine of assumption of risk:* 26 Cyc. 1177; 1 McM. L. 383. *Federal doctrine:* 231 U. S. —, 58 L. Ed. 231; 229 U. S. 317; 233 U. S. 42; 233 U. S. 492; see also 141 N. W. 300; 61 So. 179.

Mr. M. F. Ansel, also for respondent, cited the following additional authorities: *Assumption of risks:* 94 S. C. 154; 80 S. C. 238; 220 U. S. 595. *"Car" defined:* 196 U. S. 15 and 16; 231 U. S. 678.

July 31, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

This is an action for personal injury.

The plaintiff claimed that he was a switchman in the employ of the defendant. That he went to the switch on a switch engine and, after the engine and cars passed over the switch, he threw the switch. That the engine stopped very near the switch. That the rules permitted the engine to move only after he (plaintiff) had given the signal. That he could signal either the fireman or the engineer. That he was on the fireman's side and looked up, but did not see the fireman and gave no signal. That the train crew were in a hurry, and he started across the track to signal the engineer. That when he was on the track he saw the engine coming back rapidly and very close to him. That in order to save himself from being run over by the engine, he jumped at a footboard on the front of the tender (the engine was running backwards), and missed his footing on account of the defective condition of the footboard. The plaintiff was thrown under the engine and seriously injured.

The defendant set up that the plaintiff himself gave the signal to come back and then went on the track in front of the moving engine. That it was a very dangerous place; denied the defective condition of the board. Pleaded assumption of risk and contributory negligence.

The plaintiff was engaged in making up an interstate train and the defendant claimed that the plaintiff's rights, if any, are under the federal statute. (Act of Congress, April 22, 1908, 35 U. S. Stat. 65, pt. 1, c. 149, U. S. Comp. St. Supp. 1911, p. 1322.)

The trial resulted in a verdict and judgment for the plaintiff, and the defendant appealed upon twelve exceptions. The appellant, however, condenses his exceptions into four propositions, which are as follows:

I. "The specific acts of negligence charged in the complaint are not breaches of any federal statute enacted for the safety of employees."

The point here is that the federal statute (Safety Appliance Act and amendments thereto) forbids the use of defective "running boards," and the board complained of is a

"footboard," and a footboard is not within the provision of the federal statute. In the complaint the board in question is called a "footboard." In the answer of appellant the board is called, in the third paragraph, the "running board." In the fourth paragraph it is called the "footboard." In the cross-examination of plaintiff, he was three times asked by appellant about the "running board." In the trial of the cause the appellant used the terms "footboard" and "running board" interchangeably. If there was a difference it ought to have appeared in the evidence, and there was no evidence of a distinction between the two. The appellant requested his Honor, Judge Rice, to charge the jury that the plaintiff had not brought himself within the protection of the federal statute. This his Honor declined to do, and properly so. To illustrate—a man is charged with killing a partridge out of season.

REP.]

April Term, 1914.

The Judge who tried the case could no more charge that the bird in question was a partridge than he could charge that the defendant had killed it. So here, his Honor could not charge that the board upon which the plaintiff attempted to stand was not a running board, particularly when the words had been used interchangeably by the appellant, and there was no evidence of a distinction in the testimony.

II. "The specific acts of negligence charged in the complaint not being breaches of any federal statute enacted for the safety of employees, the defense of assumption of risk, as at common law, is open to the defendant, unaffected by any constitutional or statutory enactment of South Carolina."

His Honor charged the jury in unmistakable terms, at appellant's request: "VII. This section is to be determined by the provisions of the Employers' Liability Act of Congress, which supersedes all State regulations of the subject."

"XI. Whatever in the Constitution of South Carolina which militates against the defense of assumption of risk is superseded by the Employers' Liability Act of Congress."

This proposition cannot be sustained.

III. "The error of the presiding Judge in construing the Employers' Liability Acts."

In discussing this proposition, appellant says:

"The effect of this charge is that where there is any defect in the appliance furnished by the master, irrespective of the vital inquiry whether the defect is a violation of a federal statute enacted for the safety of the employee or not, the defense of assumption of risk is eliminated. This, as we submit, under the Horton case (*S. A. L. Ry v. Horton*, 34 Sup. St. 635, 233 U. S. 492) is clearly a misconception of the effect of the liability acts. If the defect is not a breach of such a statute, the defense is open as at common law."

In the charge his Honor did make some remarks about the general law of assumption of risks, but he charged the jury in unmistakable terms that the Federal Employers' Liability

Act alone governed this case, and it does seem that the jury could not have misunderstood him. In the particulars mentioned in the federal statute, assumption of risk is not a defense.

IV. "The errors of the presiding Judge in his declaration of the assumption of risk."

His Honor left it, properly, to the jury to say whether the board was a "running board." If it was a "running
4 board," then the plaintiff was within the protection of the statute if it was defective. These were questions of fact. The Judge told the jury that the federal statute alone applied.

The judgment is affirmed.

This case has been carried to the United States Supreme Court upon writ of error.

8896

McKEOWN v. SOUTHERN RAILWAY CO.

(82 S. E. 437.)

CARRIER AND PASSENGER. CHARGE. TICKETS. EJECTION OF PASSENGER.
WILFULNESS DAMAGES.

1. Where after changing the advertising name of train, No. 37, from "Washington and Southwestern Limited," to "New York, Atlanta and New Orleans Limited," a carrier sold a ticket for passage over the route on which this train ran and between points at which this train stopped, stamped "Not good on Washington and Southwestern Limited," the limitation did not then apply to train No. 37, and the purchaser was entitled to transportation on that train.
2. Where a carrier having means and opportunity to investigate, refused to investigate a reasonable explanation given by a passenger in regard to his right to ride upon a ticket in his possession, or to accept a ticket, and ejected the passenger from the train, assigning as the only reason, that it might not have time to ascertain the truth until too late, the question as to the reasonableness of the explanation, and as to whether or not the ejection was wilful was properly submitted to the jury.

Ref.]

April Term, 1914.

3. A passenger presenting a good ticket is under no obligation when threatened by the carrier with ejection from the train to pay an addition fare, or make a deposit of cash on account thereof, in order to prevent the anticipated wrong or minimize damages to arise therefrom.
4. A conductor being charged with the duty to heed the reasonable explanation given by a passenger of his right to ride upon a ticket in his possession, and to investigate their truth, refusing to attempt an investigation, the carrier, his employer, is charged with the information which such investigation might have furnished.
5. In action an action by a passenger against a carrier for a wrongful ejection from a train a charge, "that this action is predicated not on the negligence of the selling agent, but on the negligence, wilfulness, wantonness, recklessness and maliciousness of the ejecting agent. If the agent at Chester represented to the plaintiff that that ticket was good on train No. 37 and the plaintiff paid his money on that representation believing it, he had the right to ride on No. 37. It is the duty of the conductor in charge of the defendant company's train to heed the reasonable explanation of the passenger, where the passenger is found to be in possession of an irregular ticket, and if the conductor acts without heeding the reasonable explanation of the passenger, he runs the risk of the passenger being right, and if the passenger is right the conductor subjects the company to a cause of action for damages; and if the conductor recklessly, wilfully, or wantonly refuses to heed them, he subjects his company to punitive damages if the passenger be injured through the wrongful ejection; and if the passenger bought the ticket on the representation of defendant's selling agent that it was good for a particular train, and the passenger honestly believed that, paid his money for it on that belief and took that train, if he was ejected, he was wrongfully ejected." *Held*, entirely upon the law, applicable to the hypothetical statement of facts, and sustained.
6. Want of wilfulness of carrier's ticket agent in issuing a ticket which misled its conductor, cannot negative the wilfulness of the conductor in ejecting the passenger without investigation of his reasonable explanation.

Before PRINCE, J., Chester, Fall term, 1913. Affirmed.

Action by James S. McKeown against Southern Railway Company. From judgment for plaintiff, defendant appeals.

Messrs. McDonald & McDonald, for appellant, submit: *No proof of bad motive accompanying ejection, verdict should have been directed for defendant as to punitive dam-*

ages: 2 Suth. Dam. (3d ed.) 1085, 1092, 1095; 69 S. C. 434, 444; 2 Rich. L. 283; 3 S. C. 580; 28 S. C. 265; 35 S. C. 475, 488, 489, *note*; 28 Am. St. Rep. 875, 878, 879, 881; 60 S. C. 67; 62 S. C. 270; 64 S. C. 12. *North Carolina law in such cases*: 107 N. C. 327; 12 S. E. 138; 140 N. C. 196; 52 S. E. 731. *See, also*: 53 N. E. 84; 3 Ga. App. 142; 59 S. E. 323. *Duty to minimize damages*: 75 S. C. 355; 69 S. C. 539; 90 S. C. 507, 510, 512, 513.

Mr. R. L. Douglas, for respondent, cites: *Refusal of conductor to heed passenger's explanations*: 64 S. C. 514; 69 S. C. 327; 88 S. C. 7; *Ib.* 427; 94 S. C. 95. *Passenger's right to rely on information given by ticket agent*: 87 S. C. 184; 88 S. C. 421, 426. *Effect of limitation stamped on ticket*: 65 S. C. 523. *Wilfulness, a question for jury*: 69 S. C. 160; 65 S. C. 122, 128; 64 S. C. 242, 244; 90 S. C. 507. *As to minimizing damages*: 92 Am. Dec. 276, 280; 34 N. E. 742, 744.

July 17, 1914.

The opinion of the Court was delivered by Mr. JUSTICE FRASER.

The plaintiff, who lives in Chester county, had an engagement to attend a convention that met in Greenville on the 18th of March, 1913. From his home he called over the phone the Southern depot at Chester and asked for information as to routes and rates from Chester to Greenville, stating that he wanted to reach Greenville about midday of 18th. There was a choice of routes and rates offered. The agent advised the longest route and the highest rate by Charlotte. There were special excursion rates to the convention. The plaintiff asked the agent if he knew of any one else who was going, and the agent replied that Mr. Douglas was going, and the plaintiff told the agent he would communicate with Mr. Douglas and get him to get the ticket for him. He did so. Mr. Douglas bought two excursion

REP.]

April Term, 1914.

tickets, one for himself and one for the plaintiff. Mr. Douglas was informed that the route by Charlotte would require the payment of Pullman fare extra. The Pullman tickets were purchased in Charlotte. The train these gentlemen took at Charlotte made only three stops between Charlotte and Greenville, to wit, Gastonia, Blacksburg and Spartanburg. Between Charlotte and Gastonia the ticket collector of the defendant and the Pullman conductor demanded the tickets. The Pullman conductor took his ticket, but the ticket collector of the defendant refused to honor the tickets of the plaintiff and Mr. Douglas, and demanded cash fare. Both of these gentlemen refused to pay the fare. They explained fully the circumstances under which the tickets were bought. That they had contracted for that train, and had paid all that was demanded of them, and that they were assured that they had complied with all requirements and were entitled to ride on it upon their tickets. They requested the conductor, to whom the matter was referred by the ticket collector, to wire the Chester agent and ascertain from him the facts. The conductor declined to wire as it might take until the next day to get an answer. The plaintiff and Mr. Douglas were told that if they did not pay the cash fare by the time they reached Blacksburg, they would be ejected. They did not pay and were ejected. This action was brought for both actual and punitive damages for the ejectment at Blacksburg.

The defendant did not deny the circumstances surrounding the purchase of the ticket and claimed that the delict, if any, was in the issuance of the ticket at Chester and not the ejectment at Blacksburg. In other words, that the agent at Chester, by mere inadvertance, had delivered to the plaintiff and Mr. Douglas tickets that were old, out of date, and tickets that the conductor on this train, which was a "limited train," could not have accepted, and that the conductor acted in perfect good faith and in obedience to rules in refusing to accept the tickets. (Mr. Douglas has brought a separate

action.) The judgment was for the plaintiff and the defendant appealed.

In order to avoid confusion, it is well to eliminate some questions that are not before this Court. This is not a question of rates. The defendant said in the trial more than once, "it is not a question of not charging enough." It is not a question of through travel. There was no question of local travel. This question was not raised and there were other local passengers. This train was to stop at Greenville. There was some testimony as to some offer by the plaintiff to pay the difference between the ticket and the cash fare, but this is not important here, as defendant protested that "it is not a question of not charging enough."

Two questions may arise:

1. Did the ticket entitle the plaintiff to passage on this train.

2. If the ticket was insufficient, was the defendant bound to heed the explanation of the passenger?

1. Did the ticket entitle the plaintiff to passage on this train?

The trouble with the ticket was that it had printed on it in red letters these words: "Not good on Washington and Southwestern Limited."

The official designation of this train was "No. 37." It seems that the ticket was old and the advertising name had been changed from "Washington and Southwestern Limited" to "New York, Atlanta and New Orleans Limited."

1. The new name is in the folders issued by the defendant and the new name is set up in the answer. The answer set up the "New York, Atlanta and New Orleans Limited as words of similar import." The defendant made a contract to carry the plaintiff from Chester to Greenville and gave the plaintiff a ticket to show that the fare had been paid and the contract made. The ticket had a limitation. The defendant printed and issued the ticket. If it wanted to limit the ticket, it ought to have done so. It

did limit the ticket and the limitation did not apply. There was nothing on the ticket to show that the ticket was not good on "No. 37" or the "New York, Atlanta and New Orleans Limited." The contract of transportation being general, with a limitation expressed, the ticket was good and the plaintiff was entitled to be transported unless he came within the limitations, and we have seen that he did not.

The second question, based upon a void ticket, need not be discussed as it does not properly arise. It can have no effect on this case.

2. The fifth and sixth exceptions complain of error in the refusal of the motion for a nonsuit and a direction of verdict as to punitive damages. Apart from the fact that the plaintiff was ejected after the presentation of a

2 valid ticket, an explanation was given and it was for the jury to say whether it was reasonable or not. This explanation the conductor refused to accept, or even to investigate, and the only reason given was that he might not have been able to learn the truth until too late. The duty of the carrier to heed the reasonable explanations of passengers is too plain, and the authorities too recent and too numerous to require citation.

3. The fourth exception complains of error in the refusal of his Honor, Judge Prince, to charge the defendant's fifth request to charge in reference to the duty of the passenger to minimize his damages by paying the cash fare in

3 anticipation of his ejection and thereby avoid it.

If the action had been for a past wrong, then it was his duty to minimize. To this point the authorities are clear and full. No binding authority has been cited that holds that a passenger is required to minimize on anticipated wrong. For instance, if the wrong complained of had been the mistake of the agent at Chester, then the duty to minimize would have been upon the plaintiff. Judge Prince held that this action was for the ejection at Blackburg and not the past action at Chester, and the rule does not

apply. There is just as much difference between the two as there is between a release for future negligence and as release for past negligence. It may be that a nervous man or even a prudent man will have enough money with him to purchase his tickets and pay his cash fare, too, in case it is demanded, but there is no such requirement and the plaintiff here said he did not have enough for both.

This exception is overruled.

The third exception is much like the fourth, except that his Honor charged the jury that the conductor was charged with the knowledge of what happened at Chester. The

duty of the conductor was to investigate. *Teddars*

4 v. *Southern Ry.*, 97 S. C. 153, 81 S. E. 474. The

conductor had the opportunity to, at least, try at Gastonia before they reached Blacksburg and he was charged with the information that an investigation might have furnished.

5. The second exception raises this same question of imputed knowledge and is covered by the comment on exception three.

6. The first exception can not be condensed, and will have to be copied.

"1. Because his Honor erred in charging the jury as follows:

'Now, I charge you in this case that this action is predicated not on the negligence of the selling agent, but on the negligence, wilfulness, wantonness, recklessness and maliciousness of the ejecting agent. I charge you that

5, 6 if the agent at Chester represented to the plaintiff that ticket was good on train No. 37 on the main line, and the plaintiff paid his money on that representation believing it, he had the right to ride on No. 37, and I charge you, further, that it is the duty of the conductor in charge of one of the defendant company's trains to heed the reasonable explanations of a passenger where the passenger is found to be in possession of an irregular ticket, and if he

REP.]

April Term, 1914.

acts without heeding the reasonable explanation of a passenger he runs the risk of the passenger's being right, and if the passenger is right he subjects this company to damages, to a cause of action for damages; and if he recklessly, wilfully, or wantonly refuses to heed them, he subjects his company to punitive damages if the passenger be injured through the wrongful ejection; and I charge you if the passenger bought the ticket on the representation of that agent that it was good for a particular train, and the passenger honestly believed that, paid his money for it on that belief and took that train, if he was ejected he was wrongfully ejected. Now, I am making this plain, because there are some very nice questions of law that the defendant and other companies in like circumstances will have to get the Supreme Court to settle. But you can't settle it. You have got to take what I say, and I am giving you what I believe the law; the specific error being (a) that while the action may not have been predicated on the negligence of the selling agent at Chester, yet such negligence was set up in the answer of the defendant in order to negative wilfulness, wantonness, recklessness and maliciousness on the part of the ejecting agent. (b) That under such charge his Honor practically instructed the jury that they must render a verdict for the plaintiff, and thereby charged upon the facts in violation of the Constitution of this State. (c) That by such charge the duty of the plaintiff to minimize the damages, ensuing, or about to ensue, from the negligence of the selling agent at Chester, after his attention had been called to such negligence, was entirely excluded from the consideration of the jury."

a. It is difficult to see how the want of wilfulness at Chester can negative wilfulness at Blacksburg. The action was for the ejectment at Blacksburg. This position can not be sustained.

b. That charge was entirely on the law, and the objection can not be sustained.

c. This position can not be sustained for the reason stated above.

The judgment is affirmed.

MR. CHIEF JUSTICE GARY and MR. JUSTICE HYDRICK concur in the result.

8889

DOUGLAS v. SOUTHERN RAILWAY CO.

(82 S. E. 489.)

CARRIER AND PASSENGER. TICKETS. EJECTION OF PASSENGER. WILFULNESS. DAMAGES. CHARGE.

The questions in this case are controlled by decision in *McKeown v. So. Ry. Co.*, 98 S. C. 338, 82 S. E. 437.

Before PRINCE, J., Chester, Fall term, 1914. Affirmed.

Action by R. L. Douglas against Southern Railway Company. From judgment for plaintiff, defendant appeals.

Messrs. McDonald & McDonald, for appellant.

Messrs. R. L. Douglas, S. E. McFadden and Marion & Marion, for respondent.

July 17, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

The action in this case grew out of the same facts as the case of *McKeown v. Southern Railway Company*, 98 S. C. 338, 82 S. E. 437. The complaints and answers are practically the same, and the exceptions raise the same questions.

It would be a useless waste of time to write and a useless expense to print a separate opinion.

The judgment in this case is affirmed for the reasons set forth in the *McKeown* case.

MR. CHIEF JUSTICE GARY and MR. JUSTICE HYDRICK concur in the result.

REP.]

April Term, 1914.

8615

GREGORY-CONDER MULE CO. v. RODDEY.

(78 S. E. 876.)

APPEAL AND ERROR. REMAND. OPINION.

1. There being a conflict of testimony as to terms of contract in question, and as to the assignment of the chose in action to plaintiff, it was error to direct verdict for plaintiff.
2. The Supreme Court should not, in its opinion upon reversing and remanding for a new trial, unnecessarily make a statement of the facts and their consequences, so as to raise or suggest questions which the parties have not raised at trial.

Before SPAIN, J., Columbia, February, 1912. Reversed and remanded for new trial.

Action by the Gregory-Conder Mule Company against J. B. Roddey. From a judgment for plaintiff, defendant appeals.

Mr. Frank G. Tompkins, for appellant, cites: *Case should have been submitted to jury*: 68 S. C. 466; 78 S. C. 58; 40 S. C. 466. *Issue as to payment*: 77 S. E. 722. *Novation*: 29 Cyc. 1130.

Messrs. Lyles & Lyles, for respondent.

June 24, 1913.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

This is an action on account for a set of furniture sold to Mr. Roddey by Mr. H. A. Taylor. The plaintiff claimed that the account was assigned to it, and that no part thereof had been paid. The defendant, Roddey, claimed that the account had been paid by certain commissions, to which he was entitled on a sale of an automobile by the plaintiff to Taylor. The presiding Judge directed a verdict for the plaintiff, from which defendant appealed.

There was much conflict of testimony as to whether the account was assigned or not and as to the terms of the contract between the plaintiff and Taylor in the sale of the automobile. These questions ought to have been submitted to the jury. There are four exceptions, but the above statement disposes of all that are necessary to a determination of this case. This Court might make a statement of the facts and their consequences at the various times; and, as they were affected by the change in the relations of the parties, it would be manifestly unfair to do so, as it might raise questions that the parties have not seen fit to raise, and might practically determine the facts, and this Court should do neither.

The judgment is reversed and the cause remanded for a new trial.

MR. JUSTICE GAGE was not on the bench when this case was decided.

8819

THORNTON v. SEABOARD AIR LINE RAILWAY.

(82 S. E. 438.)

MASTER AND SERVANT. FEDERAL EMPLOYERS' LIABILITY ACT. NEGLIGENCE. ISSUE FOR JURY. DAMAGES. ASSUMPTION OF RISKS. CHARGE. APPEAL AND ERROR.

1. Evidence tending to show that decedent, a car inspector employed in defendant's railroad yard, left its office in a normal condition of mind to inspect an incoming train on the main track; at the same time a switch engine was backing a train of cars on an adjoining track, down the yard, which was dark and unlighted, with no lights or person on the advancing cars or person going ahead of them, or other warning given to warn the employees in the yard of their approach; and that decedent failed to arrive at the point on the main track where he was to commence the inspection of the cars in the incoming train, and was found, later, lying on the sidetrack on which the switch engine had been backing said cars, and had apparently

REP.]

April Term, 1914.

been dragged about 250 yards from a point where his cap was found between the main and sidetracks, with his torch a couple of yards off and blood on the wheels of the cars which had been backed on the sidetrack, indicating they had run over him. *Held*, sufficient to go to the jury on the issue of whether or not decedent's death was caused by the acts of negligence, or some of them, on the part of defendant alleged in the complaint.

2. In an action for negligent injuries or wrongful death, plaintiff's failure to prove one of the several acts of negligence alleged does not warrant the direction of a verdict for defendant.
3. Where the servant of a railroad was run down in the yards, but there were no eyewitnesses to his death, it will not be presumed that he intended to commit suicide, and threw himself under the cars, but it will be presumed that he was attempting to carry out his duties with due care.
4. While negligence cannot be presumed, but must be proved, it may be established by circumstantial evidence.
5. If there is no competent evidence to go to the jury, a nonsuit should be granted.
6. A charge that a recovery could be had under the Federal Employers' Liability Act for the damages suffered by the wife and children of decedent only if dependent upon him, and only to the extent that he contributed to their needs, and that in estimating such damages the jury might take into consideration such contributions as a married daughter or adult child would reasonably have a right to expect, under circumstances rendering such daughter or child dependent upon such parent; *held*, not error, and if erroneous, then harmless, as there was no evidence that decedent contributed to such daughter or child.
7. Where the Court, in an action for the wrongful death of a husband and father, charged that the law only intended to reimburse the family dependent upon the husband, a charge that it made no difference how much the deceased was earning, the question being how much did he contribute for the support of his family, if erroneous, was harmless.
8. In an action for the wrongful death of a father, where a charge was requested that in determining the probable duration of contributions to children, one of whom was married, and the other of whom was a boy 14 years of age, it must be considered that there was no legal responsibility resting on the father to support children who have arrived at the age of 21 years, it was not error to add that if those should be found the facts, they should be considered.
9. Under the Federal Employers' Liability Act (Act Feb. 22, 1908, c 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), a servant does not assume the risk of injuries occasioned by the master's negligence.

10. The refusal of a charge in an action for the wrongful death of a servant, which assumed that he was not killed in a certain manner, is proper, where the evidence raised conflicting inferences.

Before PRINCE, J., Abbeville, April, 1913. Affirmed.

Action by Ella M. Thornton, administrator of estate of J. F. Thornton, deceased, against Seaboard Air Line Railway. The facts are stated in the opinion. From a judgment for plaintiff, defendant appeals.

The charge of the trial Court, and exceptions thereto were as follows:

Mr. Foreman and Gentlemen of the Jury: The time has come in the progress of this cause when it becomes my duty to declare unto you the law applicable to this case, and I leave it to you to apply the law as I give it to the facts as you find them, and write an honest verdict, whether it be for the plaintiff or whether it be for the defendant.

Now, the plaintiff comes into Court complaining of the defendant and alleges that defendant is a railway corporation engaged in interstate commerce and that, at that time mentioned in the complaint, the intestate, who was the husband of plaintiff and the father of two children, if you find that he was the husband of plaintiff and the father of two children, for whose benefit this action is brought, was in the employ of an interstate railway, and that he lost his life while engaged in inspecting an interstate train by reason of certain negligent conduct on the part of the defendant, its servants and agents.

FOOTNOTE.—On the question whether a servant may assume the risk of dangers created by the master's negligence, see notes in 4 L. R. A. (N. S.) 848, and 28 L. R. A. (N. S.) 1215. Also see notes on assumption of risk on failure of master to perform statutory duty, in 6 L. R. A. (N. S.) 981, 19 *Ib.* 646, 22 *Ib.* 634, 33 *Ib.* 646, 42 *Ib.* 1229, 49 *Ib.* 471; 4 Am. & Eng. Ann. Cases 599, 18 *Ib.* 36, and in Ann. Cas. 1918, C. 210. As to the distinction between the rule *res ipsa loquitur* and the rule as to circumstantial evidence of negligence. See note in 6 L. R. A. (N. S.) 837.

REP.]

April Term, 1914.

The allegations of negligence, as I recall, are: That they did not have the yard, the freight yard of the defendant, properly lighted; that they backed a train of cars into a siding without having stationed at the end of the cars a man to warn the people who might be upon the track, of the approach of the cars; that they did not have a light upon the end of the cars. Now, what other acts of negligence? I recall four, which are as follows: First, did not have the yards properly lighted; second, did not have a light on the end of the cars that they were backing down the track; third, did not keep a proper lookout; and, fourth, no one to go ahead of the train to warn people of its approach.

Now, Mr. Foreman, these are the acts of negligence alleged in the complaint, and to those acts of negligence the plaintiff is bound as with a bond, and she must either prove those acts of negligence alleged in her complaint or fail. If she proves those, she must go further and satisfy you by the greater weight of evidence that one or more acts of negligence complained of in her complaint was the proximate cause of the death of her husband.

Now, Mr. Foreman, the defendant comes into Court and admits that it is a railroad engaged in interstate commerce, and that the defendant was in its employ and met his death in its yards, but denies every act of negligence complained of and denies the responsibility for his death. Now, those are the issues raised by the pleadings.

Mr. Foreman, a great deal has been said about this act of Congress, passed in 1908, known as the "Federal Employers' Liability Act." I charge you that this act of Congress did not undertake to prescribe the duties of the master to the servant, or to define the duties of the master to the servant, the railroad to its employees. The obvious purpose of this act was to confer upon certain surviving relatives the right to maintain an action that they could not have maintained at common law. At common law, Mr. Foreman, if a man was injured through the wrongful conduct of

another and died before action was brought, no right survived to his relatives or next of kin, although he may have instituted suit before his death, yet upon his death the right of action abated. The obvious purpose of Congress was to confer upon relatives of certain employees engaged in interstate commerce the right to maintain an action for the wrongful death of an employee of a railroad engaged in interstate commerce, that was the purpose of that act.

Prior to that time, we had no Federal law on the subject, although the Constitution of the United States had given over to the Federal Congress the authority to regulate interstate commerce. Now, prior to that time the different States had adopted different regulations and prescribed different rights of action. A great many of the States, probably a majority of them, had adopted what is known as the "Lord Campbell Act," an act adopted with some slight modifications in South Carolina years ago, and it had been the State law up to the time of the passage of this Federal Employers' Liability Act, which is now exclusive for all wrongful deaths of employees of railroad companies engaged in interstate commerce; that is exclusive; that wiped out all State law in so far as it bestows a right of action on certain surviving relatives of employees of railroads engaged in interstate commerce. We must look to that act to see what rights are given to the personal representatives and for whose benefit that right of action is given under that act. Unto that act also, must we look for guidance in this case. Now, Mr. Foreman, it provides that an administrator or personal representative of an employee, working for a railroad while engaged in interstate commerce, should have the right to maintain an action for the benefit of certain relatives for the wrongful death of the employee; the death of an employee that resulted while engaged in interstate commerce or about the business of an interstate carrier while engaged in interstate commerce, through wrongful conduct of the interstate carrier, or rail-

road company, through its negligence, wilfulness or wantonness; it does not make any difference. Now, Mr. Foreman, this act does not undertake to prescribe what is negligence; it leaves the law as to what constitutes negligence where it existed before. It creates and prescribes no new duty of the master to the servant, but merely gives a right of action for the benefit of certain surviving relatives, that did not exist at common law. Now, Mr. Foreman, for what did it give a right of action? Not only for the negligence of the master, but for the negligence of the officers or servants of the master while engaged in interstate commerce.

Now, prior to that time in some States and prior to a certain date in South Carolina no right of action was given for the wrongful death of an employee or servant when his death was the proximate result of the negligence of a fellow servant or fellow employee, but under this act a right of action is given for the wrongful death of an employee caused by the negligence of a fellow employee or an officer of the company while engaged in interstate commerce. For whose benefit might the action be maintained, under this act, in derogation of common law? This new right given by Congress is for the benefit of whom? (1) For the benefit of the man's wife and children surviving him; if none, then for his parents; if none, then for the next of kin dependent upon him; and if none, then the cause or right of action fails. For those beneficiaries named and no other this act of Congress gives the right of action.

Now, Mr. Foreman, while this act does not undertake to prescribe, in any manner, the duties of the master to the servant, yet, under the law that was evidently recognized by Congress when it adopted this act. That it was assumed by Congress in adopting the act that the master did owe certain duties to the servant, and what were they? Duties that he could not assign to another so as to save himself from liability, to save himself of the responsibility for failure to perform those duties by another, and therefore, these certain

duties that are devolved by law upon the master are spoken of as nondelegable and nonassignable duties. What are they? They are the duties that rest upon every master; the duty that rests upon every master is to furnish the servant a place in which to do the work; that is, a *reasonably* safe place for the performance of the duties required of the servant. That is a nondelegable and nonassignable duty. The master is held to this degree of care in furnishing this place; that he exercise in furnishing this place the same care which a man of ordinary prudence would have exercised in like circumstances, to see that the place is reasonably safe and suitable for the performance of the duties devolved upon the servant.

Mr. Foreman, the law does not impose upon the master the duty of providing the *safest* place in which to work; nor does it impose upon the master the duty of furnishing or supplying a safer place for the servant; it only imposes this duty upon the master, and it imposes it with emphasis, that he shall furnish a place that is *reasonably safe and suitable* for the performance of the duties required of the servant. It is the duty of the master to furnish reasonably safe and suitable appliances; not the safest or the most modern, that is not necessarily so, but appliances that are reasonably safe and suitable and to keep them in reasonably safe and suitable repair for the safety of the servant. That is all the law requires of the master. A failure to exercise that degree of care, gentlemen, would be negligence; a failure to do that which a man of ordinary prudence would have done in the circumstances, or the doing of that which a man of ordinary prudence would not have done in the circumstances, would be negligence.

Mr. Foreman, the burden rests upon the plaintiff in this case to show that the master had been negligent in one or more acts complained of, and, as a proximate result of that negligence, plaintiff's intestate met his death. It is not enough to show that plaintiff's intestate was killed by

REP.]

April Term, 1914.

defendant, railway company's train; it is not enough to show that his death was the result of some negligence on defendant's part, or its servants or agents. The law requires the plaintiff to prove not only that her husband met his death by the instrumentalities complained of, but that it was the proximate result of that *particular negligence* set out in her complaint, and though it might appear that he was killed by the railway and killed as a proximate result of the negligence of the railway, but unless it was that *particular negligence alleged in the complaint* the railway *could not* be held liable in this case.

Now, gentlemen, every servant assumes the risk or risks, I will say, that are ordinarily incident to his employment. That does not include the risk of the negligence of a fellow servant, and never includes the risks of the negligence of the master in the performance of one of these nondelegable, nonassignable duties, nor does he assume, under this act, the risks of the violation by the master of any act that undertakes to prescribe and regulate the duties of the master to the servant, such as the Federal Safety Appliance Act, and this is the only act that has been brought to my attention. When I speak of acts, I mean the Federal act, the only one that has been brought to my attention. That act is not necessarily involved in this case; it is not involved in this case. There is no testimony that I recall at this moment showing that there was a failure to furnish the appliances provided for by act of Congress, known as the Safety Appliance Act. I do not recall any testimony that these certain cars complained of in the complaint were not equipped with safety appliances. That is not the act under which we are trying this case.

Now, all risks ordinarily incident to employment the servant assumes when he enters upon the discharge of the duties that are his under the employment; I mean, of which he has knowledge or is presumed to have knowledge, those that are open or apparent. Of course, he does not assume

the risks of hidden or concealed dangers, but those that are apparent; those he could see by the exercise of ordinary diligence. He assumes the risks that are ordinarily incident to his employment, except risks—I say he never assumes the risks of the negligence of the master when performing one of those nondelegable, nonassignable duties, the negligence of his fellow servant, nor does he assume the risks of the failure of the master to obey any statute that undertakes to prescribe the master's duty to the servant; those are not assumed.

Mr. Foreman, the defendant pleads contributory negligence. Contributory negligence, of course, will not be considered by you unless you should conclude that plaintiff has established not only the wrongful death of her intestate, but that his death was the proximate result of one of the acts of negligence complained of in her complaint. Now, if she has done that, and you are satisfied of this by the greater weight of evidence, you are then to consider the plea of contributory negligence. Now, under our statute law, that is, our State law, when contributory negligence is a proximate cause of plaintiff's injury and without which it would not have happened, it would be a complete bar. I mean, it would be a complete bar to plaintiff's recovery, but, under the Federal law, it is not a complete bar, even when properly established; it only mitigates. The jury should only decrease the damages awarded against the defendant in proportion to the comparative negligence of plaintiff's intestate; in other words, if you should find that both the master and the servant, railway and the deceased, were negligent, and the negligence of both, the master and the servant, the railway company and the deceased, when combined, was the proximate cause of his death, and without his own negligence he would not have met his death; under our statute law that would be a bar, but under the Federal law, it would not be a complete bar to recovery. It is only to be considered by the jury in determining what damages they should award

REF.]

April Term, 1914.

plaintiff, and they should apportion the verdict according to the relative negligence of the railway company, its servants and agents, and the deceased.

Now, Mr. Foreman, if plaintiff has established her right to recover at all in this case; of course, I should say right here, however, that if plaintiff's intestate met his death through one of the risks ordinarily incident to that employment, and was not a risk brought about by reason of the negligence of the master, intestate's fellow servants, or other officers and agents of the company, then and in that case it would be a risk assumed by plaintiff's intestate; unless it was a risk caused by some failure of the company to observe some act of Congress that has been enacted for the benefit and protection of the employee, then it was assumed that he met his death under one of those assumed risks and plaintiff would not be entitled to recover in this case, but suppose, Mr. Foreman, the plea of contributory negligence has not been established by the greater weight of evidence, or suppose you cannot say where lies the greater weight of evidence on this issue, then the defendant fails to establish the plea, and in such case, if you should find that the deceased came to his death through the wrongful conduct or act of the defendant, its servants or agents, in the manner complained of, and due to the acts of negligence alleged in the complaint, then how much would you allow plaintiff? Mr. Foreman, you should allow the plaintiff, for the benefit of the wife and children, just such compensation, or damages rather, as would compensate for the loss of financial support, and nothing else. Now, this act of Congress differs from our State law in some respects, one of which is, under our State law, we could allow for the loss of society of the husband where he has been wrongfully killed, and the wife and children would be entitled to compensation for the loss of the society of the husband and father, but it is not true now under this act of Congress. You cannot take into consideration the pain and suffering arising from the sorrow

and grief at the husband's and father's death, if you find that he was the husband and father. You cannot take that into consideration as you could under the State law. All that you can take into consideration is the loss of financial support. It makes no difference, Mr. Foreman, under this act what was the earning capacity of the deceased; it matters not how much money he might have earned; it has nothing to do with the case. The question is, how much did he contribute to the support and maintenance of his wife and children. That is the question, and the burden rests upon plaintiff to show how much he contributed, and plaintiff can only recover in this case, if she is entitled to recover at all, the amount she has shown by the greater weight of evidence, that she and her children have been deprived of by reason of the wrongful death of her husband. That is all. And in that respect, the law of Congress is somewhat different from the State law, and we cannot take into consideration all the many things that we could take into consideration under the State law that has been repealed by this act.

Now, it is this: What was the financial loss to the plaintiff and her children, or what financial loss may they have reasonably anticipated? It is for you to say what that support would have been. In determining that, Mr. Foreman, since this law only intended to reimburse the members of the family dependent upon the husband whose death was caused by the wrongful act of another, you can allow such damages as those persons were reasonably expected to receive, and no more. Mr. Foreman, you have a right in determining this matter to consider the ages of those children. You have a right to consider the fact that even though a child be of good physical capacity and intellectual capacity, as long as it is a minor, it would have the right to reasonably expect to be supported or maintained by its father. You would have a right to consider the fact that the daughter is married, if she is married; you would have the right to take into consideration the question as to whether she would have rea-

REP.]

April Term, 1914.

sonably expected any contribution to her support from her father, if living. Would he probably have granted it? While you may allow children to recover under this act who are beyond the age of twenty-one years it must be by reason of some inability or incapacity of the children to earn a livelihood, because this act was intended to compensate people who are dependent relatives, who are dependent upon the deceased for support, and only to the extent to which they are dependent. Those are matters for you to take into consideration. Now, Mr. Foreman, when you come to another view of the event to which you must take into consideration the loss, under our statute, and under our law, it is permitted that this mortuary table, which has been read, may be offered in evidence, to determine the probable expectancy of life in any case. This table is not intended to be absolutely binding and conclusive, but is offered for the consideration of the jury just like any other testimony, and the jury may take the life expectancy as prescribed in those figures in determining the probable expectancy of life, if determining how long this man would have probably lived had he not met with a violent death.

Now, Mr. Foreman, in considering the loss to his family, you must consider the probable duration of support he would have rendered his family, and, of course, in considering that, you necessarily take into consideration his probable length of life, or what term of years he might have reasonably expected to live. You will take into consideration, Mr. Foreman, his reasonable, if any, expectancy of increased experience by reason of increased knowledge of his business in considering whether or not that would have probably increased his earning capacity. In that connection, Mr. Foreman, take into consideration whether or not he would have contributed more to the support and maintenance of his family had his earnings increased. You may take into consideration the probability or possibility of his earning capacity decreasing with the coming years as he grew older.

These are matters you are to consider in determining how long this man would probably have lived, and to what extent the amount devoted to his family's support would be increased or decreased as age grew on. These are matters for your consideration. I cannot help you; you must settle all that. Take your good common sense and your conscience into the jury room and apply them both as straight-edges to the testimony as you have heard it, and the law as I have given it to you, and make application of the law to the evidence and let your verdict speak the truth. You and I do not care who wins this case. We are not interested in plaintiff's recovery, nor in defendant's recovery. It makes no difference to us who wins, provided the right obtains according to our best judgment; that is all for which we are responsible. In our present capacity we are not responsible for the law, nor in our present capacity are we responsible for the facts or the proof or the failure of proof. We must take the case as we find it, and apply to the facts as straight-edges our common sense and good consciences and write a righteous verdict. Anything short of that would be dishonor to our manhood, and anything more than that would be disgraceful. That is what we have to do. Write an honest verdict, whether it is for plaintiff or defendant, and that verdict must be your honest judgment under the law as I have given it to you, and the facts as you find them to be from the evidence.

Now, Mr. Foreman, if it were not for the fact that I have been handed numerous requests for charge, I would think that I have said enough, but it is the privilege of counsel to formulate these requests for charge and it is the duty of the Judge to pass on those requests, and say whether they be right or wrong in his declaration of the law to the jury, and I will proceed to do so. * * *

Defendant's counsel has handed me requests for charge, which are as follows:

REP.]

April Term, 1914.

I. Plaintiff brings her action as personal representative to recover damages for herself and her children on account of the death of her husband. The jury is instructed that she can recover no damages except pecuniary loss sustained by herself and her children on account of such death, even if she is entitled to recover.

By the Court: I charge you that, provided you find that she is otherwise entitled to recover.

II. No damages can be given on account of grief or wounded feelings of the plaintiff or her children.

By the Court: I charge you that.

III. No damages can be given for the loss of society or companionship of the plaintiff's deceased husband.

By the Court: I charge you that.

IV. The jury can only give damages for such sums as there was a reasonable expectation of plaintiff and her children receiving from decedent during his life.

By the Court: I charge you that; that is, had he not been killed.

V. The jury cannot give the plaintiff the full amount of money which her decedent was receiving multiplied by the number of years which he would reasonably have been expected to live, but the verdict for damages, if damages are recovered, must be based upon the amount which plaintiff and her children might reasonably have expected to receive from decedent.

By the Court: I charge that except I modify it. A man may give all his earnings to his family. If the proof satisfies you that he did so in this case, then you are to take into consideration the full amount of his earnings in arriving at your verdict.

VI. You are further instructed that you cannot arrive at the amount which plaintiff annually contributed to the support of his wife and children, or for their benefit, and then multiply that amount by number of years that he would reasonably be expected to live, but you can only give the

present value of the pecuniary loss of the beneficiaries by reason of the death of the intestate. You can only give the sum which would represent the present value of the various sums, or the annual sums which the beneficiaries would reasonably expect to have received in the future but for the death of the intestate.

By the Court: I charge you that, Mr. Foreman. The jury cannot take the expectancy and multiply what they received annually by the expectancy and arrive at it; that would not be a correct estimate. That would be giving them now what they would reasonably expect to receive in the future. You must reduce what they would reasonably have expected to receive to a present value.

VII. In awarding damages, the jury must take into consideration the fact that the earning power of the deceased might, at any time, have been materially, or even wholly destroyed. You are to further consider and make proper allowances for the probable decreased earning power of the deceased arriving at the approaching old age.

By the Court: I charge you that with this modification: that if you find his earning capacity would probably be increased, you can take that into consideration just as you take into consideration the probability of his earning capacity being decreased; just whatever is probable.

VIII. You must consider in estimating damages, if any damages are awarded, the probable duration of the contributions which husband and father would have made to his wife and children, and in arriving at this, you should consider the probable expectancy of the life of the husband and father, how long he would have lived to have given them money, you must also bear in mind the probable duration of the contributions to the children, one of whom is now married and the other of whom is a boy fourteen years of age. and you must consider that there is no legal responsibility resting upon the father to support the children that arrive at the age of twenty-one years.

REF.]

April Term, 1914.

By the Court: I charge you that, Mr. Foreman, if you should find that one of the children is married and the other a boy fourteen years of age; if you should find those to be the facts, then you are to take into consideration those facts in determining how long the father would have probably contributed to their support in getting at the amount.

IX. If you conclude to award damages, you are to consider the probabilities whether or not the father's contributions to the children would have ceased when they reached the age of maturity, or at their marriage, or whether they would have ceased before that time.

By the Court: I charge you that, Mr. Foreman, but I charge you that after reaching the age of twenty-one years, or married, children are not permitted to recover; a father may not be legally responsible for the support and maintenance of his children after they are twenty-one years of age, but if they should be sick and helpless, they would have a right to expect the parents to assist them in making a support. You are to take into consideration what they would reasonably have a right to expect in the event of such conditions.

X. In estimating damages, if you conclude to award damages, you must consider how much of his earnings he would have reasonably spent on himself, as the part of his wages he expended on himself could not be considered in estimating the damages his wife and children might have suffered.

By the Court: I charge you that. If in estimating the sum his wife and children might expect—that means simply that what the husband used on himself for his own support and maintenance, cannot be considered by you in determining what loss the wife and children suffered. The question is, what they have lost and what they have suffered. You cannot take into consideration the amount he expended on himself, except you can take into consideration the amount he had left of his earnings after spending a certain amount on himself.

XI. You are further instructed, if you conclude to award damages, that only the sum of money can be given to the beneficiaries entitled to recover under the acts of Congress that would compensate them for the actual pecuniary loss sustained by them because of the death of the husband and father.

By the Court: That is just what I have told you before. If the plaintiff is entitled to recover at all, she is only entitled to recover pecuniary loss sustained by her and her children because of the death of the husband and father.

XII. You are further instructed that even if you conclude to allow damages, you must bear in mind that the deceased, had he lived, may at times been out of employment with or without his own fault, the probability of his earning capacity becoming totally or partially impaired through sickness or other contingencies, that his life might have been terminated by causes within his control, or not within his control, all of which possibilities compel the reduction of the gross calculation.

By the Court: I charge you that.

XIII. You must further consider, if you decide to award damages, that by a present payment the beneficiaries would get the benefit of accrued interest on any sum you might award to them, and you must make allowance for this. Guided by these and other considerations, you can only give that lump sum of money as damages which as a present payment would compensate the beneficiaries for whose benefit this action is brought, for the actual pecuniary loss sustained by them.

By the Court: Yes, I think that is right, and practically what I have told you two or three times.

XIV. You are further instructed that you are not to accept as absolute certainty the period of expectancy based upon the mortality tables which have been offered in evidence, these are intended to guide, but not to control you. They are based upon averages. There is no absolute certainty that

REF.]

April Term, 1914.

any person would live the average duration of life laid down by these tables. They are at best probabilities, and man's expectancy varies with, or may vary with, his employment. His expectancy will also vary, or may vary on account of his own physical condition, or his health and other considerations, and the jury should consider all of these matters in arriving at the probable length of time which the deceased would have labored and been able to labor.

By the Court: I charge you that, gentlemen; that you are to consider all these things, the probable length of his life, consider his habits, nature of his employment, physical condition, health, etc. You are to take into consideration all these things, and by your good sense and judgment applied to the facts as you find them, determine how long this man would probably have lived. Of course, that would be an estimate. We cannot say with absolute certainty how long a man would live, but you have a right to form your estimate, provided you do so according to your best understanding after reviewing all the testimony in the case and considering all probabilities that would be suggested by common experience.

XV. You must not allow any damages, if you decide to award damages, on account of sympathy, bereavement, or on account of love and devotion that may have existed between husband and wife, father and children, nor on account of their sorrow and loss of companionship, or grief or wounded feelings, or anything of that kind resulting from the death of the husband and father.

By the Court: I have already charged you that.

XVI. The jury is instructed that under the Federal law, when plaintiff's decedent entered the employ of the defendant, he assumed the risks incident to the defendant's manner of performing its duties. He was a man of mature years, judgment and discretion, and knew the dangers ordinarily incident to working in a yard where the tracks are close together, and of working in the yard where he lighted him-

self with lamps, and the jury is instructed that, knowing these facts, it was not negligence as to him for the master to perform and carry on its business without lights other than the lanterns which its employees carried in the yard, and he assumed the risk of doing the business assigned to him by the master in the way designated and assumed all risks incident to performing its said duties, without the yards being lighted, except as provided for him by the master.

By the Court: I won't charge you that he was a man of mature years, as counsel has asked me to do, but I charge you in this way: if you find him to be a man of mature age, judgment and discretion, and he knew the dangers ordinarily incident to the work on defendant's yard where the tracks are close together, and working in a yard where he lighted himself with lanterns, the jury is instructed to arrive at these facts, but that is not enough. I am not going to charge it in that way. I will refer you to my general charge about that question of lights. If you should find that the practice and custom of the defendant company was to have its employees use lanterns and flambeaux and if you should find that the use of such lanterns and flambeaux sufficiently lighted the yard for the reasonable safety of its employees, who were exercising for themselves due care for their own safety, then the master could not be charged with negligence in not having it lighted in some other way; if that way was reasonably adequate for the safety of the employees who themselves exercised due care for their own safety. To furnish that degree of light which would render a place reasonably safe for an employee working there with reasonable or ordinary care for his own safety, is all the law requires. And if those lights were reasonably adequate for that purpose, that is all the law requires, even though the place might have been better lighted in some other manner. The question is, was that method *reasonably adequate* for the safety of the employees who themselves were exercising ordinary care for their own safety.

REF.]

April Term, 1914.

XVII.

By the Court: I decline to charge you No. 17.

Court did not read No. 17 to the jury, but this request reads as follows: 'It is alleged in the complaint that Thornton was killed while in the act of inspecting train No. 25. The testimony in this case shows that he was not so killed and the jury is instructed not to consider that allegation in passing upon this said case.

XVIII. The only other charge made in this case is that while Thornton was in the yard for the purpose of inspecting train No. 25, a string of cars backed down upon him, and that the rear end of said train of cars, or some car thereof, struck him and knocked him down and that he was killed in that way, through the negligence of the defendant, as alleged in the complaint. The jury is instructed that unless the plaintiff has satisfied them by the preponderance of the testimony that Thornton was struck by the rear end of the said string of cars as it backed down through the yard, or some car thereof, and killed, there can be no recovery in this case, but the verdict must be for the defendant.

By the Court: I think counsel meant to say "some part thereof struck him and knocked him down" instead of "some car thereof."

(Counsel replies in the affirmative.)

I charge you that. If you find that he met his death that way by either being run down or knocked under the train, by either that string of cars or one on the main line, they complain of, if either of those caused his death through some act of negligence alleged in the complaint, then plaintiff would be entitled to recover by reason of the fact that deceased left beneficiaries, as required by the statute, if you so find. I will charge you that coupled with this understanding. My understanding of the law is that if he was injured by either the train of cars on the main line or by this string of cars, of which you have heard spoken, and run over by either, or knocked down by either, and run over by

one, and that act that caused his death was the proximate result of some act of negligence complained of in the complaint, then the defendant would be liable; but, if he was injured and was not injured that way at all, but by some other act of negligence on the part of the defendant, it would not be liable. It must be some act, or acts of negligence complained, the defendant is not liable here, and it would be death as herein alleged, by some act, or acts alleged in the complaint, the defendant is not liable here, and it would be your duty to write a verdict for the defendant.

XIX. The burden of proof is upon the plaintiff to satisfy the jury that Thornton came to his death in the manner and by the means alleged and set forth in the complaint, and as the result of the negligent acts set forth therein, and, if the jury in this case is unable to say from the preponderance of the testimony that the rear end of the said string of cars, or some car thereof, struck him and knocked him down and killed him as alleged in the complaint, they must find for the defendant.

By the Court: I charge you that, Mr. Foreman, provided that if that string of cars, or that train of cars on the main line, if either knocked him down and caused him to be run over and if that striking him was the proximate result of some act of negligence of the defendant company, complained of in the complaint, then the plaintiff would be entitled to recover, if she has proven that deceased left a wife and children.

XX. That if after hearing all the testimony the jury can not say whether Thornton came to his death in the manner alleged in the complaint—that is, by being struck by the rear end of the string of cars or a car thereof, or from some other cause, or in some other way, a verdict must be rendered for the defendant.

By the Court: I will charge you in my own language. If you cannot say after careful consideration of all the testimony in what manner this man came to his death, through

REF.]

April Term, 1914.

what negligence or acts of negligence he came to his death operating as a proximate cause—if you cannot say where lies the greater weight of evidence in this case, then it is your duty to write a verdict for the defendant, because in order to justify plaintiff's recovery, she must show that the deceased came to his death in the manner suggested in her complaint and by reason of the particular acts of negligence complained of, and unless she does so, she is not entitled to recover.

XXI. That the mere fact that plaintiff's intestate was killed gives no right of action, nor is there any presumption of negligence from the fact that an employee was killed, but the burden is on plaintiff to prove that he was killed by the rear end of the string of cars, or some car thereof, as alleged, and as a result of the negligence alleged.

By the Court: I have covered that in my charge.

Now, gentlemen, I have taken a great deal of time, about half as much as I have allowed counsel, because I want you to understand this case. This is a new act under which this case is brought, new to us although it has been on the books since 1908, and it is very important that both the Judge and the jury should understand the legal duties devolved upon the railroad to its servants, and by that I mean employees, every employee is a servant under the law. I do not mean to speak disrespectfully of deceased in referring to him as "servant." I speak of him as a servant only in sight of the law. It is our duty to fully understand what the law is as it is your duty to fully understand what the facts are, and it is up to you. If plaintiff is entitled to recover at all, she must recover by reason of the fact that she has established, by the greater weight of evidence, her cause of action, and that defendant has failed to establish, by greater weight of evidence its plea of assumption of risk, and then in its other defense, contributory negligence. If you should find that deceased was guilty of contributory negligence, that would only mitigate the damages to be allowed plaintiff, if she is otherwise entitled to recover.

I am handing you the complaint and answer in this case, and if you desire to refresh your memory as to the issues raised in the pleading, you may read them. I am going to give you plenty of time in which to consider this case. Now take this (indicating) and write your verdict on the back of the original complaint. Let your verdict be in this form. If you find for plaintiff, say: "We find for plaintiff so many dollars," writing it out in words and not in figures. If you find for defendant, say: "We find for defendant." That is all you need say, for the defendant is not seeking to recover anything. Underneath your verdict, Mr. Foreman, sign your name and under that write the word "Foreman."

The defendant's sixth, seventh, eighth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, eighteenth and nineteenth exceptions, were as follows:

VI. Because his Honor erred in instructing the jury that they would have a right in estimating damages to take into consideration the question as to whether or not the married daughter of the plaintiff's deceased would have reasonably expected any contribution to her support from her father, if living. It is respectfully submitted, that in the absence of proof, no damages could be awarded to the plaintiff on account of said married daughter, and in this case there was no proof of any expectation of financial assistance from the plaintiff's deceased, to such married daughter, and therefore it was in error to allow the jury to pass upon this question and to speculate as to such damages.

VII. Because his Honor erred in charging the jury as to whether or not the father would have made contributions towards the support of his married daughter, as follows:

"Would he probably have granted it? While you may allow children to recover under this act, who are beyond the age of twenty-one years, it must be by reason of some inability or incapacity of the children to earn a livelihood, because this act was intended to compensate people who are depend-

ent relatives, who are dependent upon the deceased for support, and only to the extent to which they are dependent. Those are matters for you to take into consideration."

The error consists in this, that there was no evidence in this case that the said married daughter was unable or incapable of earning a livelihood, or that her husband was unable or incapable of earning a livelihood for her, and there was no evidence that she was either dependent or likely to be dependent upon the plaintiff's deceased, and it was, therefore, error to submit this to the jury and allow it to speculate upon these matters.

VIII. Because his Honor erred in charging the jury as follows: "You will take into consideration, Mr. Foreman, his reasonable, if any, expectancy of increased experience by reason of increased knowledge of his business in considering whether or not that would have probably increased his earning capacity." In that connection, Mr. Foreman, take into consideration whether or not he would have contributed more to the support and maintenance of his family had his earnings increased."

The error consists in this, that there was no allegation or proof that plaintiff expected, or had any reason to expect, any increased earning capacity, or that it was probable, and it is respectfully submitted that such being the case, his Honor erred in allowing the jury to speculate upon this question and to take into consideration matters not raised, either by the pleadings or the proof. Under the act in question only such damages could be recovered as were proved to have been suffered and there was, and is no proof, nor evidence that plaintiff's intestate expected, or had any right to expect, any increase in his wages over and above what he was at that time receiving.

It is, therefore, submitted that said charge was harmful to the defendant herein and erroneous.

XI. Because his Honor erred in charging the jury in response to the eleventh request to charge that if the yards

of the defendant, where Thornton had to work, were insufficiently lighted out of the negligence of the defendant, then the said Thornton could not be held to assume any risks caused by the said insufficient lighting. It is submitted that under the Federal law, applicable to this case, that when Thornton entered the employ of the defendant, knowing how the yards were lighted, and being a man of mature years, and judgment, he assumed the risks of all injuries resulting from the manner in which the defendant lighted its yards and as to him that manner of lighting was not negligence.

The charge was further erroneous in this, that the undisputed evidence in this case shows that the yards were properly lighted, and that the employees of the company had lights suitable for operating trains, and it was error to allow the jury to pass upon this uncontradicted testimony and to find contrary to it without evidence.

XII. Because his Honor erred in charging the jury that under the acts of Congress, upon which this case was founded, the employee of railroad companies does not assume the risks of injury, which are brought about by the negligence of the railroad company. The error consists in this: the charge can only be applicable to the manner in which the defendant lighted its yards, and the facts in this case showing that the plaintiff's intestate entered the employ of the defendant, knowing how the yards were lighted, and that he continued in the employ of the defendant, using such lights as were furnished him without objection, he assumed all risks incident to the performance of his duties with such lights, even though it may have been negligence on the part of the defendant in not furnishing other lights.

The charge was further erroneous in that as to Thornton it was not negligence to so light the yards of the defendant by reason of the fact that he entered the employ of the defendant, knowing how the yards were lighted. He was a man of mature years and judgment and continued in the

REP.]

April Term, 1914.

employ of the defendant knowing that the yards were so lighted, and as to him it was not negligence to carry on the business of the defendant in this way.

XIII. Because his Honor charged the jury in response to the eleventh request of the plaintiff as follows: "I charge you that, Mr. Foreman, but I charge you that after reaching the age of twenty-one years, or married, children are not permitted to recover; a father may not be legally responsible for the support and maintenance of his children after they are twenty-one years of age, but if they should be sick and helpless, they would have a right to expect the parents to assist them in making a support. You are to take into consideration what they would reasonably have a right to expect in the event of such conditions."

(a) It is submitted that the said charge in so far as it is assist the min making a support. You are to take into consideration what they would reasonably have a right to expect a charge upon the facts in this case, contrary to the provisions of the Constitution of this State forbidding Judges from charging juries with respect to matters of fact.

(b) It is submitted that the charge was erroneous in that there is no evidence in the case that either of the children is sick or helpless or likely so to be, and for that reason they will need any assistance from the parent after arriving at the age of twenty-one years, or since marriage, and therefore the charge of his Honor permitted the jury to speculate as to matters of damages in this case without proof.

(c) It is further submitted that under the Employers' Liability Act in this case, no damages can be recovered except pecuniary damages *proved* to have been suffered; and in this case there is no allegation or evidence as to damages resulting from a sick or helpless condition of children after they reached the age of twenty-one years, or married, and it was error for his Honor to instruct the jury to take that matter into consideration. There was no evidence from which a reasonable expectancy of such event might be anticipated,

and it was error to allow the jury to speculate as to such damages.

The charge was further erroneous in that it allowed the jury to add to the damages purely a speculative amount without evidence to support it and at the mere caprice of the jury. Such damages cannot be awarded under the provisions of the Federal Employers' Liability Act.

XIV. Because his Honor erred in refusing to charge the sixteenth request of the defendant as follows:

"The jury is instructed that under the Federal law, when plaintiff's decedent entered the employ of the defendant he assumed the risks incident to the defendant's manner of performing its duties. He was a man of mature years, judgment, and discretion, and knew the dangers ordinarily incident to working in a yard where the tracks are close together, and of working in the yard where he lighted himself with lamps, and the jury is instructed that, knowing these facts, it was not negligence as to him for the master to perform and carry on its business without lights other than the lanterns which its employees carried in the yard, and he assumed the risk of doing the business assigned to him by the master in the way designated and assumed all risks incident to performing its said duties, without the yards being lighted except as provided for him by the master."

It is respectfully submitted that the said requests stated nothing but the admitted facts of the case, and the law applicable to the admitted facts; and that his Honor erred in not charging the said request as submitted and erred in modifying the same, by allowing the jury to say without evidence to support it that the place was not reasonably safe for the plaintiff's intestate to perform its duties, when the undisputed testimony shows that as to plaintiff's intestate there was no negligence in the manner in which its yards were lighted, and that he assumed all risks incident to performing

REF.]

April Term, 1914.

his duties in the yard of the defendant with the lights furnished him.

The refusal to charge the said request effectually denied to defendant the plea of assumption of risks to which it was entitled under the Federal Employers' Liability Act.

XV. Because his Honor erred in not charging the jury at the request of the defendant in its seventeenth request to charge to the effect that the undisputed testimony in this case shows that Thornton was not killed while inspecting train No. 25. It is respectfully submitted that the undisputed testimony shows that he was not so killed and his Honor should have charged the request as submitted.

XVI. Because his Honor erred in not charging the jury in response to the eighteenth request that the only charge made in addition to the allegation that plaintiff's intestate was killed while inspecting train No. 25 is that while he was in the yard of the defendant for the purpose of inspecting train No. 25, a string of cars backed down upon him and the rear end of the said string of cars, or some part thereof, struck him and knocked him down and he was killed in that way through the negligence of the defendant, as alleged in the complaint and erred in not instructing the jury that unless the plaintiff has satisfied them by the preponderance of the testimony that Thornton was struck by the rear end of the said string of cars as it backed down through the yard, or some part thereof, and killed, there can be no recovery but the verdict in this case must be for the defendant, and erred further in instructing the jury in response to the said request that if Thornton was struck by train No. 25 and knocked under the string of cars, or that if he was struck by train No. 25 and killed through the negligence of the defendant, the plaintiff might recover.

It is submitted that the eighteenth request to charge correctly states the issues joined by the pleadings in this case, and it was erroneous in his Honor not to so charge the jury.

It is further submitted that his Honor erred in charging the jury that if plaintiff was struck by the train of cars on the main line and that if either of the string of cars or the train of cars on the main line caused his death through some act of negligence alleged in the complaint, then plaintiff would be entitled to recover. It is respectfully submitted that there is no allegation that plaintiff was struck by the train of cars on the main line, and absolutely no proof to such effect and to allow the jury to render a verdict on this ground was to allow it to find a verdict for the plaintiff on an issue not raised by the pleadings and on purely speculative grounds.

XVIII. Because his Honor erred in charging the jury as follows: "Now, gentlemen, every servant assumes the risk or risks, I will say, that are ordinarily incident to his employment. That does not include the risk of the negligence of a fellow servant, and never includes the risks of the negligence of the master in the performance of one of these nondelegable, nonassignable duties.

It is submitted that this charge can only be applicable in this case to the charge that the grounds were insufficiently lighted. It is further submitted that the undisputed testimony shows that plaintiff's intestate was a man of mature years and judgment and that he entered the employ of the defendant, knowing how the yards were lighted, and that he continued in the employ of the defendant, knowing that the yards were so lighted, and even though the defendant may have been negligent in this, yet he would assume all risks of injuries suffered thereby, especially if he fully appreciated the dangers thereof. That his Honor erred in not so charging the jury and erred in charging the jury to the contrary. The charge had the effect of denying to defendant the plea of assumption of risks as provided for by the Federal Employers' Liability Act.

XIX. Because his Honor erred in charging the jury in response to the twelfth request of the plaintiff: "That under

REP.]

April Term, 1914.

the act of Congress, on which this action is founded, an employee of a railway company does not assume the risk of injury which is brought about by the negligence of the railway company."

It is submitted that this request to charge in this case is applicable only to the allegations that the yards in this were insufficiently lighted. It is submitted that the undisputed testimony shows in this case that plaintiff's intestate entered the employ of the defendant, knowing that the yards were lighted by flambeaux and reflectors and in no other way, and that he continued in the employ of the defendant knowing this fact, and knowing that trains were operated in the yards by such flambeaux and lights, and the only reasonable inference to be drawn from the testimony is that he appreciated the dangers thereof and assumed the risks incident to the defendant's so lighting its yard, even though in this respect it might have been negligent.

It is further submitted that in any view of the case the charge was erroneous and his Honor should have left it to the jury under the facts of the case to say whether or not plaintiff's intestate assumed the risks of injuries arising from this manner of lighting the yard, even though the defendant may have been negligent in so doing.

The charge, it is submitted, had the effect of denying to defendant the plea of assumption of risks to which it was entitled under the Federal Employers' Liability Act.

Mr. J. L. Glenn, for appellant, cites: *Death not shown to be due to defendant's negligence*: 80 S. C. 469; 72 S. C. 398; 2 Labatt Master and Servant, sec. 837. *Assumption of risk*: 228 U. S. 700; 223 U. S. 1; 227 U. S. 59; 21 S. C. 531, 547; Pierce on Railroads 349; 72 S. C. 347; 61 S. C. 478; 80 S. C. 233; 86 S. C. 229; 87 S. C. 210; 55 S. E. 483; 136 S. W. 644. *Charge on measure of damages*: 228 U. S. 173; 227 U. S. 147, 59.

Mr. Wm. P. Greene, also for appellant, cites: *Assumption of risk*: 1 Labatt Master and Servant 274, 274a; 4 Thompson Negligence, secs. 4608, 4609, 4610; 147 U. S. 238; 122 U. S. 189; 111 N. Y. 550; 135 U. S. 554; 109 U. S. 487; 211 U. S. 459; 196 U. S. 51; 80 S. C. 238; 86 S. C. 235; 74 S. C. 425; 21 S. C. 574; 191 U. S. 64; 87 S. C. 213; 86 S. C. —.

Mr. Wm. N. Graydon, for respondent, cites: *Circumstantial evidence of defendant's negligence as proximate cause of decedent's death*: 191 U. S. 64. *Duty toward employees in railroad yards*: 67 S. C. 141. *Assumption of risks*: 223 U. S. 1; 32 Sup. Ct. 169; 156 L. Ed. 327; 65 S. C. 302; 60 S. C. 9; 75 S. C. 303; Const., art. IX, sec. 15; 75 S. C. 68. *Charge on damages unprejudicial and not called to the attention of trial Court*: 72 S. C. 361; 44 S. C. 346; 75 S. C. 469; 68 S. C. 38; 74 S. C. 102, 135; 80 S. C. 410; 95 S. C. 196; 61 S. C. 474.

April 27, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS. •

This was an action by plaintiff for the alleged wrongful killing of plaintiff's intestate, J. F. Thornton, by the defendant, for damages under the Federal Employers' Liability Act. The cause was tried before his Honor, Judge Prince, and a jury, at the April term of the Court, 1913, for Abbeville county, and resulted in a verdict in favor of the plaintiff for \$8,500. After entry of judgment, the defendant appeals and by nineteen exceptions, some of which are subdivided, complains of error on the part of his Honor, but raises practically six questions: First. Error in allowing the plaintiff to amend her complaint. At the hearing of the case in this Court the defendant abandoned this exception. The second question raised by the exceptions alleges error in refusing to

direct a verdict for the defendant, moved for as set 1, 5 out in exceptions two, three, and four. It is so well settled that if there is any competent testimony to go to the jury, a nonsuit can not be granted or verdict directed, that quotation of authority is unnecessary. It has been further decided that the failure to prove one of several acts of negligence alleged does not furnish any ground for the direction of a verdict. *Cain v. Railroad Co.*, 74 S. C. 90, 54 S. E. 244. "Whenever there is any competent testimony it is the duty of the Judge to submit the case to the jury." *Buist Co. v. Mercantile Co.*, 73 S. C. 48, 52 S. E. 789.

There is no dispute that the plaintiff's intestate was killed by the train, that the yards were not lighted, and the evidence shows that there was no one on the back of the cars to giving warning, and there is no contention that any warning was given. The question, then, is: Was the plaintiff's intestate wrongfully or negligently killed by the defendant company, its agents, or servants? A case is usually made out by the positive testimony of eyewitnesses, to a transaction, who swear they saw the occurrence, and describe how it occurred. In this case we have no positive testimony as to how it occurred as no witness saw how it happened, and we must resort to the evidence of circumstances to arrive at a conclusion as to how it occurred, and say whether or not there was sufficient evidence in the case for his Honor to submit the question to the jury, as to whether or not deceased was killed negligently, by the defendant, in any of the particulars alleged and specified in the complaint. There was evidence in the case to show that when the deceased left the office, to inspect train No. 25 coming into the yards, at the same time a switch engine, with a number of cars back of it, was coming down the yard. On this switch engine train there was no light on the rear of the train, which was the front part as it was pushed down the yards, and no one was going ahead of it to warn the other employees in the yard. No one was on the front of the leading car as

required by the rules. There was no light on the end of the cars, and no warning was given of its approach. Train No. 25 was coming in on main line when deceased started to inspect it. The switch engine and cars were backing down track No. 1 at the same time train No. 25 was coming in the yard. Thornton was missed by White when he started to inspect train No. 25. His evidence is that there was a car, five or six cars from the caboose, that had some flat wheels and he stopped there to see about the wheels and also looked for Thornton, but did not see him as he was not on the other side of the car where he should have been. White and Thornton, the inspectors, were accustomed to walk down to the train as it came into the yard, watch the train as it passed by, so that by the time the train stopped they would be at the rear of the train when they would start the inspection. On this night White, one of the inspectors, got to the station but saw nothing of Thornton. After inspecting the train on both sides and still seeing nothing of Thornton he mentioned this to several persons and reported to them that Thornton was missing. White then inspected two trains before he heard that Thornton had been killed. When White first saw him after he was killed he was lying on track No. 1, south of the office, at the shops. It would appear from the evidence that he was killed on the north side of the office and dragged down track No. 1 to the south side. The cars that were cut were backed down track No. 1 for the purpose of attaching them to the rear end of train No. 25, which was to run from there to Atlanta as a double-header. The evidence further shows that the cap and torch of Thornton were found last, on north of office, the cap between track No. 1 and the main line, the torch about two yards off, some parts of his clothing were found in the middle of track No. 1, and there were signs that he had been dragged in the middle of track No. 1. The conductor of train No. 25 having heard of deceased's death examined his train at Elberton, Georgia; he found pieces of flesh on the ninth car from the

REF.]

April Term, 1914.

caboose, and on up for several cars towards the engine, thus creating an inference that the cut off cars when they were backed down track No. 1, might have run over and killed Thornton, and then dragged the body down the track towards the depot, and then dragged it back past the office to the south side of the office. A number of cars had run over him. Eighteen cars from the rear end had been shoved down the track. The signs of dragging were first seen about one hundred and fifty yards north of the office, and there were signs that he had been dragged down approximately one hundred yards north of the office. The evidence was that the yard was dark. It was in evidence that the boy, who found the body, could not tell what it was until he struck a match. There was evidence that another train, No. 22, came in after Thornton went out to inspect No. 25, and left before his body was discovered, and it is not clear what time this train No. 22 came in by the evidence. Engineer A. J. Andrews testifies that he is an engineer, lives at Abbeville, and his run is between Monroe and Atlanta; that he remembers the night Thornton was killed, and that No. 25 came in that night about twelve o'clock, and that it came in ahead of No. 22, and that No. 25 was the train that Thornton should have inspected, and he thinks that No. 22 came in about twelve-thirty; that No. 22 was due to leave at one-twenty and left on time. As has been said there is no eyewitnesses to the killing. There is nothing proven by eyewitnesses as to whether the negligence of defendant, or negligence of deceased, or his contributory negligence, caused the accident. The evidence shows deceased was in a normal condition of mind when he left to inspect the cars, and there is no suggestion that he committed suicide. In the absence of proof to the contrary the presumption is that he was attempting to carry out the duties of his employment, for which he had contracted, with due care and precaution, and while plaintiff cannot recover unless some of the specifications of negligence alleged are proven and it is shown in some way that

the defendant was derelict in its duty and this dereliction and negligence was the proximate cause of the injury, yet this can be established by facts and circumstances proven to establish these particular facts, and while one fact or circumstance proven may not be sufficient to establish a particular fact a number of facts proven, combined together, may make out a chain of circumstances that establish a fact, and this chain of circumstances in this case may establish on the part of the plaintiff the negligence in whole or in part alleged in her complaint as the basis for recovery of damages. As was said by Mr. Chief Justice Gary in *Smyly et al. v. Colleton Cypress Co.*, 95 S. C. 347, 78 S. E. 1026: "The plaintiffs relied upon a number of facts and circumstances, and while no particular one is sufficient to show that they were in possession of the lands at the time mentioned, nevertheless, when the facts are considered as a whole, they satisfy us that the nonsuit was properly refused." The rule is thus stated in *Railroad v. Partlaw*, 14 Rich. 237: "It may be that no one of the facts would of itself warrant the inference and yet when taken together they would produce belief, which is the object of all evidence."

In Greenleaf Evidence, section 51a, it is said: "It is not necessary that the evidence should bear directly upon the issue. It is admissible if it tends to prove the issue, or constitutes a link in the chain of proof although alone it might not justify a verdict in accordance with it."

In the case of *Choctaw, O. and G. R. Co. v. McDade*, 191 U. S. 64, 48 L. Ed. 96, 24 Sup. Ct. 24, the Court said: "There was evidence tending to show that McDade, a brakeman in the employ of the company, was killed on the night of August 19, 1900, while engaged in the discharge of his duties as head brakeman on a car on one of company's trains. McDade was at his post of duty, and when last seen, was transmitting a signal from the conductor to the engineer to run past the station of Goodwin, Arkansas, which the train was then approaching. The train passed Goodwin at

REP.]

April Term, 1914.

the rate of 20 to 25 miles an hour. At Goodwin there was a water tank, having attached thereto an iron spout, which, when not in use, hung at an angle from the side of the tank. Shortly after passing Goodwin, McDade was missed from the train, and, upon search being instituted, his lantern was found near the place on the car where he was at the time of giving the signal. His body was found at a distance of six hundred and seventy-five feet beyond the Goodwin tank. There was also testimony tending to show, from the location of the water spout, and the injuries upon the head and person of McDade, that he was killed as a result of being struck by the overhanging spout. The car, upon which McDade was engaged at the time of the injury, was a furniture car, wider and higher than the average car, and of such size as to make it highly dangerous to be on top of it at the place it was necessary to be when giving signals, in view of the fact that the spout cleared the car less than the height of a man above the car when in position to perform the duties required of him. There was no eyewitness to the exact manner of the injury to McDade, and it is urged that the Court below should have taken the case from the jury because of the lack of testimony upon this point. It was left to the jury under proper instructions to find out whether McDade came to his death in the manner stated in the declaration, and the Court distinctly charged that, unless satisfied of this, there could be no verdict against the railroad company. While the evidence was circumstantial, it was ample, in our opinion, to warrant the submission of this question to the jury under the instructions given."

So, we say in the case at bar, without further discussion of the testimony, after carefully studying the same, that the evidence of circumstances was ample for his Honor to submit the case to the jury, and these exceptions are overruled.

As to the third and fourth questions to be determined by the Court, which are the exceptions that complain of error on the part of the Judge in charging in regard to the married

daughter, and in charging as to what children could 6, 8 expect of a parent, and in charging as to increased earning capacity, we do not think, after carefully going over the Judge's charge as a whole, that the defendant was probably prejudiced thereby to such an extent as to warrant a reversal by this Court. He told them in the plainest terms he could use, and emphasized this by repetition, that the law "only intended to reimburse the family *dependent* upon the husband, whose death was caused by the wrongful act of another, you can allow such damages as those persons are reasonably expected to receive, and no more. You have a right in determining this to consider the ages of these children. You have a right to consider the fact that even though a child be of good physical capacity, and intellectual capacity, as long as he is a minor, it would have the right to reasonably be supported or maintained by his father. You would have the right to consider the fact that the daughter is married, if she is married. You would have the right to take into consideration the question as to whether she would have reasonably expected any contribution to her support from her father, if living. Would he probably have granted it? While you may allow the children to recover under this act who are beyond the age of twenty-one years, it must be by reason of some inability or incapacity of the children to earn a livelihood, because this act was intended to compensate people who are dependent relatives, who are dependent upon the deceased for support, and only to the extent to which they are dependent." In another part of his charge he charged: "All you can take into consideration is the loss of financial support; it makes no difference under this act what the earning capacity of the deceased, it matters not how much money he might have earned, it has nothing to do with this case. The question is: How much did he contribute to the support and maintenance of his wife and children? That is the question, and the burden rests upon the plaintiff to show how much he contributed, and the plaintiff can only

REP.]

April Term, 1914.

recover in this case, if she is entitled to recover at all, the amount she has shown by the greater weight of evidence that she and her children have been deprived of by the death of her husband." We do not think that his Honor's modification of the defendant's ninth request to charge complained of by defendant's thirteenth exception should be sustained as the jury could not have been misled by it, or the defendant prejudiced thereby, even if it were erroneous it was harmless, as there was nowhere any evidence at all that the deceased contributed one cent to his married daughter, or that she was in any way dependent upon him, and his Honor repeatedly explained in this case that the recovery could only be for his wife and children dependent upon him, to the amount only that he contributed to them, and we see no error on the part of his Honor in the particulars complained of. We see no error on the part of his Honor in modifying defendant's eighth request to charge, complained of in defendant's fourth exception, for the reason that in his charge he has informed the jury that it was immaterial to the question how much the deceased, the husband, earned. But "the question is, how much did he contribute to the support of his wife and children?" If he was in error it was harmless and not prejudicial taken in connection with his charge. But we say, in being requested to charge the eighth request of defendant, he had the right to add to it and charge as he did. He announced a sound proposition of law.

The fifth question to determine is that made by the exceptions, which allege error in charging the law as to assumption of risks. These exceptions cannot be sustained. To have held this would have been in conflict with Employers' Liability Act as construed by the Supreme Court of the United States in the case of *Mondou v. New York, New Haven and Hartford R. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 156, Lawyers' edition 327. His Honor's charge in reference to this was more favorable to the defendant than defendant was entitled to, and defendant cannot complain.

The sixth question to be determined is that made by exceptions fourteen, fifteen and sixteen, alleging error in refusing to charge defendant's seventeenth, eighteenth and nineteenth requests.

The fourteenth exception is overruled by what has been said herein as to assumption of risk.

The fifteenth exception is overruled for the reason it would have been a charge on the facts; and exception sixteen is overruled as his Honor had in his own language charged the law embodied therein before the requests

10 was presented to him and in substance charged this request. After a thorough investigation and consideration of all the exceptions, the same are overruled and judgment affirmed.

MR. JUSTICE GAGE did not sit in this case.

NOTE.—This case has been carried on writ of error to the United States Supreme Court.

8914

STATE v. RILEY.

(82 S. E. 621.)

CRIMINAL LAW. HOMICIDE. EVIDENCE. DYING DECLARATION. CHARGE.

1. A declaration and belief that a wound will eventually cause death does not show that deceased declarant had abandoned hope of recovery or believed death to be imminent, and does not justify the admission of the declaration in evidence against the person charged with the homicide.
2. There is no presumption of law that any witness will tell the truth, and a charge that such presumption exists is error.

FOOTNOTE.—Instruction that witness is presumed to speak the truth as invading province of jury, see *State v. Taylor*, 57 S. C. 488, 35 S. E. 729, 76 Am. St. Rep. 575, and note in 14 L. R. A. (N. S.) 947. As to mental and physical conditions necessary to admission of dying declarations, see 56 L. R. A. 381; generally as their admissibility, see note in 56 L. R. A. 353, *et seq.*

REP.]

April Term, 1914.

3. A charge in a homicide case, that "the drift of the testimony for the defendant is that the killing was accidental—that her main defense is that the killing was an accident" is not prejudicial to the defendant charged with the homicide.
4. Ordinarily it is not permissible to instruct the jury that the testimony has a particular drift.

Before DEVORE, J., Greenwood, June, 1913. Reversed.

The defendant, Lily Riley, was indicted for murder, and being convicted of manslaughter, and sentenced to imprisonment, appeals.

The facts are stated in the opinion.

The exceptions were as follows:

1. Because it was error to charge the jury as follows: "The drift of the testimony for the defendant is that the killing was accidental—that her main defense is that this killing was an accident," thereby expressing to the jury his opinion that the defendant's testimony only drifted towards proof of accidental killing, and that the main defense was that it was an accident, when as a matter of fact, the main defense was that defendant did not commit the deed she is charged to having committed.

2. Because it was error to charge the jury as follows: "The law presumes that a party who has given up all hope of this life will tell the truth, because he knows he is going to meet his God and if man will ever tell the truth, he will then," it being submitted that it is the duty of the jury, under the law of this State, to weigh the dying declaration of a deceased person, and determine whether such declarations are to be believed, without any presumption of law that he will tell the truth being taken into consideration.

3. Because it was error to admit the declarations of deceased, since it did not appear that they were made while declarant was *in extremis* and after every hope of life was gone, it being submitted that it is the impression of impend-

ing death and not the rapid succession of death in point of fact, which renders a declaration admissible, and the belief of the declarant that he might ultimately die as a result of his injury at a time unlimited and indefinite in the future is not sufficient to authorize the admission of his statements as a dying declaration.

4. Because it was error to charge that the said declarations of the deceased were made *in extremis*, under the impression of impending death and then charge the jury that they must weigh them just as they would other testimony in the case, it being submitted that such charge was calculated to mislead and did mislead the jury when they took into consideration these subsequent words of the charge: "They are admitted in evidence only when it has been shown that the party making the declaration has given up all hope of life," and then telling the jury that they have a right to differ with the Judge after hearing all the testimony, and disregard the declarations, such charge being tantamount to the expression of his opinion on the fact which he had submitted to them, and giving them the right to disregard the testimony.

5. It was error to charge the jury that it was in their power to bring in a verdict of guilty, with or without recommendation to mercy; a verdict of guilty of manslaughter; a verdict of not guilty. "Any of those would be proper," it being respectfully submitted that such charge was calculated to mislead the jury, in view of the other misleading portions of his Honor's charge, herein above excepted to.

6. Because it was error to admit the said declarations and then charge the jury that they are to weigh the questions as to whether they are properly admitted just as they weigh any other testimony, and that it is the duty of the Judge to be very cautious and careful with reference to letting in dying declarations as evidence and thereafter charge the jury that the showing made by the State comes

REF.]

April Term, 1914.

up to the law concerning the admission of such declarations, and then leaving the facts which he charges were properly proven by the State, to be decided by the jury.

7. Because there was a total failure of proof of the *corpus delicti* and a total failure of proof that the defendant killed the deceased.

8. Because it was error to overrule the defendant's motion made for a new trial made on the following grounds: "Because there was a total failure of proof of the *corpus delicti* and no testimony to support the verdict.

9. Because the verdict is unjust in that it is unsupported by the evidence and it was impossible for the jury, under his Honor's charge, to properly understand what their duty was as to the testimony and as to the charge.

Mr. D. H. Magill, for appellant, submits: Charge as to drift of testimony was on facts; the burden being on State to show that the killing was not accidental: 68 S. C. 304. There is no presumption as to credibility of dying declarations: Wharton Hom., sec. 774; 1 R. C. L. 547 and 548. Declarations in absence of consciousness of approaching death inadmissible: 1 R. C. L. 538, 539; 4 Enc. Ev. 930. The Court should not charge as to the weight to be given dying declarations: 85 S. C. 273. Proof of corpus delicti: 3 Enc. Ev. 660-662; Wharton Hom., sec. 641; 79 S. C. 272.

Mr. Solicitor Cooper, for respondent.

August 8, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

The defendant is a young negro woman. She was convicted of manslaughter. The deceased was her husband. There was no eyewitness to the transaction. The act was done in their own house, in the night, with a pistol.

There are nine exceptions, altogether too many for so short a case.

There must be a new trial, for the second and third exceptions are well taken.

Considered inversely, the dying declaration was not competent; it did not sufficiently appear that death was

1 imminent and that the declarant had abandoned all hope of recovery.

Mr. McDowell, who took the declaration, is a lawyer and magistrate; he warned the declarant "he must be certain he was going to die." The answer was, "Yes, I am going to die; I may get up for a few days, but this wound will kill me." At another time the witnesses testified that the declarant said: "Yes, I may get up for a few days, but this shot will *eventually* kill me." The witness further testified "he didn't say that he would die from his wound any time soon, nor did he state any time at which he believed he would die from it."

The rule is stated in the *State v. Quick*, 49 S. C. L. (15 Rich.) 349: "It must appear satisfactorily that death was imminent at the time, and that the declarant was so fully aware of this as to be without any hope of life."

The dying declaration being in, the Court

2 instructed the jury that "the law presumed a party who has given up all hope of life will tell the truth."

There is no presumption that any witness will tell the truth. *State v. Mitchell*, 56 S. C. 524, 35 S. E. 210.

The declaration is only competent because he who makes it is then surrounded with the solemnities of an oath; the situation is like unto swearing a witness. It ought to be a solemn thing to uplift the hand and swear by Almighty God; it is a solemn thing to declare in the sight of certain death; a witness who thus declares has in legal contemplation been sworn and no more. "This condition of the person is considered as constituting as strong a guarantee

REP.]

April Term, 1914.

for the truth of the declaration as an oath is of ordinary testimony." *State v. Quick*, 49 S. C. L. (15 Rich.) 349.

The first exception cannot be sustained. Ordinarily, it would not be permissible to instruct a jury that the testimony had a drift; but in this instance the *drift* indicated was away from *guilt*.

The other exceptions are without merit; let them all be reported.

The verdict is set aside and a new trial is ordered.

8915

DRENNAN *ET AL.* v. AGURS *ET AL.*

(82 S. E. 622.)

WILLS. DEVISE OR BEQUESTS FOR CHARITABLE USES. MAINTENANCE OF GRAVEYARDS. ENDOWMENT OF CHURCH. UNINCORPORATED ASSOCIATION AS TRUSTEE.

1. An unincorporated religious association may take under a will as trustee, property to be used as an endowment fund for a church and to keep up certain graves.
2. Testatrix bequeathed the balance of her estate to be used for keeping up certain graves at F. church, and also as an endowment fund for the benefit of such church. *Held*, that the words providing that a part of the residuary estate should be used to keep up the graves was not intended to create an enforceable trust, but one of a precatory nature, and the whole devise was sustained as a devise to charity.

Before MEMMINGER, J., Columbia, November, 1913.
Affirmed.

Action by W. A. Drennan, William Drennan, J. H. Drennan, Ernest Drennan, Richard Drennan, Agurs Drennan, Judson Drennan, Bessie Drennan, Frances Drennan, S. S. Neeley, Lizzie D. Huey, F. T. Morgan, S. J. Kee,

FOOTNOTE.—As to validity of testamentary provision for erection of monument, or for the care and maintenance of tombs, burial grounds, etc., see notes in 1 British Ruling Cases 981 to 947. As to validity of gift to an unincorporated charity, see note in 82 L. R. A. 625.

H. R. Kee, J. T. Kee, O. R. Kee, John L. Kee, R. T. Kee, W. M. Kee, Hattie E. Entzminger and John W. McKnight, plaintiffs, against William C. Agurs, George M. Agurs, J. M. Agurs, J. W. Agurs, M. C. Scott, Nannie A. Starbuck, Mayme A. Aiken; and W. C. Hicklin, S. J. Lewis and W. R. Neeley, as trustees of Fishing Creek Church, defendants.

From judgment for defendants, plaintiffs appeal.

The facts are stated in the report by A. D. McFaddin, Esq., master, as follows:

Plaintiffs instituted their action in this Court, alleging that Julia A. Farley, late of said Richland county, departed this life, leaving her last will and testament whereby, after making certain specific bequests, she devised and bequeathed the "balance of my estate to be used for the keeping up the Agurs line of graves at Fishing Creek Church and also used as an endowment fund for the benefit of Fishing Creek Church." The complaint further alleges that at the time of her death the testatrix was seized and possessed of certain real property, situate in the counties of Richland and Chester, said State, and was possessed of some personalty; that the testatrix left as her only heirs at law the plaintiffs and defendants, with the exception of the defendant trustees; that the defendant trustees are the trustees of the Fishing Creek Church mentioned in the will; that said church is an unincorporated institution and its property and affairs are under the management and control of "said trustees;" that the residuary clause of said will is void and inoperative in law and that the property attempted to be devised and bequeathed goes by operation of law to the persons named therein as the heirs at law of said testatrix.

The defendant trustees answered, denying that the residuary clause of said will was inoperative and void; they admitted that they were the trustees of the church mentioned in said will and that they are now in possession of

REF.]

April Term, 1914.

said property, holding the same in trust for the use of said Fishing Creek Church. Further answering the complaint, said defendant alleged that letters of administration had been granted to A. M. Aiken, who had fully accounted and had been discharged; that the testatrix was a native of the neighborhood of said Fishing Creek Church and was for a number of years a member thereof and that many of her relatives were buried in the graveyard of said church and others are likely to bury there. Counsel for plaintiffs announced that he had acceptances of service of the summons and complaint in this action from all of the other defendants, and that they failed to answer.

The cause was referred to the master for Richland county by the order of Hon. T. S. Sease directing "that all issues of law and fact raised by the pleadings herein be referred to A. D. McFaddin, Esq., as master * * * with instruction to take the testimony and to report the same together with his findings and conclusions thereon * * * with leave to report any special matter."

I held references and the testimony taken is hereto attached. During the progress of the hearings objection was made to the introduction of certain testimony. I noted the grounds of the objections and reported the testimony offered. I have admitted as proper evidence in this case and have considered only so much of the testimony to which there was objection as tended to identify the person or thing intended by the testatrix.

I find from the testimony that Julia A. Farley, late of the county of Richland, said State, departed this life on or about March 18th, 1902, leaving a last will and testament. That at the time of her death the said Julia A. Farley was seized and possessed of certain real property situate in the counties of Richland and York, and was also possessed of certain personal property. That in and by said will the said testatrix, after making certain specific bequests, devised and bequeathed the "balance" of her estate to

Fishing Creek Church to be used as an endowment fund for said church and for keeping up the Agurs line of graves at said church.

I also find from the testimony that the heirs at law of the said Julia A. Farley are correctly stated in the complaint.

I also find from the testimony that the defendants, W. C. Hicklin, S. J. Lewis and W. R. Neeley, are the trustees of Fishing Creek Church, which church is in said Chester county; and that the Fishing Creek Church mentioned and referred to in the last will and testament of said testatrix is the Fishing Creek Church in Chester county of which said Hicklin, Lewis and Neeley are trustees. That said church is an unincorporated institution, conducted for religious purposes, and its property and affairs are under the management and control of said trustees. That said church is of the Presbyterian faith.

I also find from the evidence that the graveyard at Fishing Creek Church, in which the Agurs line of graves are to be found, is located wholly upon the property of that church, and that the care and general management of said graveyard constitutes a part of the work of that church. While its general care and oversight is received from said church, yet it is not restricted to its membership, but said graveyard is used as a place in which the remains of the dead of the community are interred. The testatrix, who lived to a ripe age, was born in that community and lived there until she was about forty years of age. She was a member of that church. A large number of those buried in that graveyard were related to the testatrix and many of the people now living in that community were her relatives and it is very likely that they will be buried there. The Agurs line of graves, along with the other graves in that churchyard, would have been recipients of her benefactions even though no mention had been made in regard to the same in said will,

REF.]

April Term, 1914.

as any endowment fund for the benefit of that church would be used in part for the keeping up of that graveyard.

I conclude, as a matter of law, that the devises and bequests, as contained in the residuary clause of the will of Julia A. Farley, deceased, are for charitable uses and are valid and operative in law.

I further conclude that the trust is to a person or thing sufficiently certain and for an object sufficiently definite and is capable of enforcement by a Court of equity.

All of which is respectfully submitted.

A. D. McFADDIN,

May 20, 1913.

Master for Richland County.

The will construed, was as follows:

May 25, 1897.

I being of sound mind I now make my last will.

This Will is to testify that I want three Hundred Dollars in money put out on interest the three Hundred Dollars to have good security the interest of the three Hundred Dollars to be put into the hands of some responsible person who will have my lot at the Cemetery in Columbia, S. C., kept in good order the interest of the three hundred dollars will be sufficient.

I appoint Willie Huey as my Extor of Estate to pay the person who has the lot attended to and also keeping the lot in order.

My watch small chain & Silver Cup to be given to my grand Nephew Farley Huey.

One Hundred Dollars out of my estate to be given to my niece Lizzie Huey.

The balance of my Estate to be used for the keeping up the Agurs line of graves at Fishing Creek Church, & also used as an endowment fund for the benefit of Fishing Creek Church.

I leave all my Household goods to my Niece, Lizzie Huey.

I want the bed of my grave walled in with brick also the necessary inscription put on my tombstone & before any disposal is made of my estate. JULIA A. FARLEY.

Witnesses: L. R. Aldrich, Mrs. M. G. Aldrich, Marion G. Aldrich.

The appellants' exceptions were as follows:

1. That his Honor erred in sustaining the findings of the master in said cause.

2. That his Honor erred in failing to find that the provision in the residuary clause of the will of the said Julia A. Farley, deceased, "*for the keeping up the Agurs line of graves at Fishing Creek Church*" is void and inoperative in law:

(a) As creating a perpetuity for a use not charitable;

(b) Because of there being no *cestui que trust* capable of enforcing the trust; and

(c) Because, no trustee having been appointed, and the object and subject matter of the proposed trust being indefinite and uncertain, it is incapable of enforcement by the Court, and no valid trust was created.

3. That his Honor erred in failing to find that the provision in the residuary clause of said will "*and also as an endowment fund for the benefit of Fishing Creek Church*" is void and inoperative in law:

(a) Because, being inseparably connected with the prior void bequest it must fall with it;

(b) Because, no trustee having been appointed, and the object and subject matter of the proposed trust being indefinite and uncertain, it is incapable of enforcement by the Court and no valid trust was created.

4. Because his Honor erred in sustaining the conclusion of the master that "the devises and bequests as contained in the residuary clause of the will of Julia A. Farley, deceased, are for charitable uses and are valid and operative in law."

REF.]

April Term, 1914.

5. Because his Honor erred in sustaining the conclusion of the master that "the trust is to a person or thing sufficiently certain and for an object sufficiently definite and is capable of enforcement by a Court of equity."

Messrs. Wilson & Wilson, for appellants, submit: *The provision for the keeping up of the graves was not charitable, and was void*: 2 Redfield Wills 504, 574; Tudor's Ch. Trusts 11; 48 S. C. 444; 5 A. & E. Enc. of L. 894, 933; Ames Cases on Trusts, 201, 210; 79 Ala. 423; 1 Ir. R. (1901) 394, 399; Gray on Rule Against Perpetuities, pp. 475, 604, sec. 894; 2 Hill Ch. 312; 108 N. Y. 312; 10 Vesey 521; 33 N. Y. 107; Fetter Equity 172; 37 S. C. 457; 48 S. C. 456-458. *The provision for the endowment of church being connected with the prior void bequest, must fall with it*: 5 A. & E. Enc. of L. 915, note 5; 2 Redfield Wills 397. *Because of the void and lapsed residuary legacy the property passed to the heirs as intestate property*: 48 S. C. 457; 37 S. C. 457; 147 Pa. 68; Beaver 231; Gray 627.

Mr. R. B. Caldwell, for the trustees of Fishing Creek Church, respondents, cite: *As to rules of construction*: 40 Cyc. 1386, 1392, 1395. *Charitable trusts*: 6 Cyc. 903, 913, 916; 95 U. S. 311; Perry on Trusts, sec. 687; 70 S. C. 558; 48 S. C. 444; 28 S. C. 476; 1 Rich. Eq. 99; 7 Allen (Mass.) 243; 5 Ohio St. 237; 17 R. I. 306; 68 Pac. 723; 105 U. S. 342; 1 Chest. Co. (Pa.) Reporter 482; 67 Vt. 299; 66 Wis. 366; 33 Ch. Div. 187; 146 Iowa 415; Perry on Trusts (6th ed.), sec. 706. *Statute as to wills*: 1 Civil Code, secs. 3563 and 3571. *Care of graveyards*: Crim. Code, sec. 246; 68 S. C. 489; 91 S. C. 41.

Mr. E. L. Craig, also for respondent, cites: *Trust will not fail for want of a trustee*: 48 S. C. 444; 70 S. C. 55; 1 Rich. Eq. 109; 1 Rich. 174; 3 Rich. Eq. 160; 48 S. C.

Opinion of the Court.	[98 S. C.
<p>106; 6 Cyc. 935. <i>Object and subject matter of devise sufficiently definite</i>: 1 Rich. Eq. 109; 48 S. C. 452; 43 S. C. 266; 32 L. R. A. 293; 70 S. C. 555. <i>Bequest to an unincorporated society good</i>: 48 S. C. 444; 26 S. E. 717; 1 Rich. Eq. 99; 28 S. C. 327; Hoffman's Ch. (N. Y.) 201; 1 Rich. 174. <i>Presbyterian Church defined</i>: 2 Rich Eq. 211. <i>Charities</i>: 7 Allen 243; 57 Me. 527; Perry on Trusts, sec. 706; 234 Mo. 117; 37 L. R. A. (N. S.) 999; 72 Me. 155; 9 L. R. Ch. Div. 576; 18 Eq. 114. <i>There is a cestui que trust capable of enforcing it</i>: 91 S. C. 41; 68 S. C. 489.</p>	

August 13, 1914.

The opinion of the Court was delivered by Mr. CHIEF JUSTICE GARY.

This is an action to set aside the residuary clause of a will, on the ground that it is null and void, for the reasons hereinafter mentioned.

The facts are fully stated in the report of the master, which will be reported, together with the appellants' exceptions, and a copy of the will.

The first question that will be considered, is whether there was error on the part of his Honor, the Circuit Judge, in concluding, as a matter of law, that the devises and bequests, contained in the residuary clause of the will, are for charitable uses, and therefore valid and operative in law.

That clause of the will is as follows: "The balance of my estate to be used for keeping up the Agurs line of graves at Fishing Creek Church, and also used as an endowment fund for the benefit of Fishing Creek Church."

The following findings of fact by the master do not seem to be disputed: "That said church is an unincorporated institution, conducted for religious purposes, and its property and affairs are under the management and control of said trustees; that the graveyard at Fishing Creek Church,

REF.]

April Term, 1914.

in which the Agurs line of graves are to be found, is located wholly upon the property of that church, and that the care and general management of said graveyard constitutes a part of the work of that church. While its general care and oversight is received from said church, yet it is not restricted to its membership, but said graveyard is used as a place in which the remains of the dead of the community are interred."

When the residuary clause is construed, in connection with the other parts of the will, it shows that the intention was that Fishing Creek Church should take charge of the entire residue, not only so much thereof as was to

1 be used in keeping up the Agurs line of graves, but also that part that was to be used as an endowment fund, for the benefit of said church, thereby constituting Fishing Creek Church a trustee, for the purpose of administering the trusts created by the residuary clause.

If such had not been the intention of the testatrix it is but reasonable to suppose that she would have used other words to express her intention. She evidently thought it was necessary to appoint trustees, to carry the provisions of the will into effect, as is shown by the following language of the will: "This will is to testify that I want three hundred dollars in money put out on interest, the three hundred dollars to have good security, the interest of the three hundred dollars to be put into the hands of some responsible person, who will have my lot in the cemetery in Columbia, S. C., kept in good order; the interest of the three hundred dollars will be sufficient.

"I appoint Willie Huey as my executor of estate to pay the person, who has the lot attended to, and also keeping the lot in order."

The words providing that a part of the residuary estate was to be used for keeping up the Agurs line of graves at said church, were not intended to create an enforceable

trust, but they were of a precatory nature. The
2 testatrix intended to emphasize the manner in which
she wished a part of the residue expended, but left
the matter to the discretion of Fishing Creek Church.
The amount to be expended was not specified, nor the
manner in which the trustee was to keep up the said graves,
as was done when provision was made for keeping in order
her lot in the cemetery in Columbia.

These conclusions show that none of the exceptions can
be sustained.

Judgment affirmed.

MR. JUSTICE WATTS dissents.

8916

ELLIOTT v. PAGE *ET AL.*

(82 S. E. 620.)

SPECIFIC PERFORMANCE. ELECTION OF REMEDIES. APPEAL AND ERROR.

1. The burden is upon the appellant to show that findings of fact sought to be reviewed were against the preponderance of the evidence.
2. The Court on appeal will not consider propositions of law not urged, or ruled upon, in the trial Court.
3. A plaintiff having elected to ask for the specific performance of a contract, cannot after being denied that relief on the hearing of the cause on its merits, demand that the action be treated as one for damages for breach of contract, and that he be allowed to renew the contest in order to assert therein a right to such damages.

Before SPAIN, J., Conway, October, 1913. Affirmed.

Action by H. D. Elliott against Charley Page, Julius Blanton, John P. Cooper, O. V. Page, Loula Page, Julia Buffkin, Claudia Anderson, Jennie Page, William R. Page, and Inez Page.

REF.]

April Term, 1914.

From a decree for defendants, plaintiff appeals. The facts are stated in the opinion.

Mr. H. H. Woodward, for appellant, cites: 32 S. C. 203; 53 S. C. 563.

Mr. W. F. Stackhouse, for respondents, *distinguishes* 32 S. C. 203.

August 13, 1914.

The opinion of the Court was delivered by MR. CHIEF JUSTICE GARY.

This is an action for specific performance of a contract.

His Honor, the Circuit Judge, dismissed the complaint, on the ground that the plaintiff had failed to perform the obligations imposed upon him by the contract.

The plaintiff appealed upon two exceptions, the first of which assigns error in the finding, that the plaintiff had not carried out his part of the contract.

The appellant has failed to satisfy this Court that said finding of fact was against the preponderance of

1 the evidence. This exception is therefore overruled.

The second exception is as follows:

"That under the authority of the case of *McCarter v. Armstrong*, reported in 32 S. C. 203, 10 S. E. 953, 8 L. R. A. 625, as the contract was one requiring special personal service, to wit, a drainage contract, and, therefore, one which the Court could not enforce by a decree of specific performance, he should have held, that although the relief of specific performance should be refused, that the plaintiff's proper remedy was one at law for damages, for breach of contract on the part of the defendants, and instead of dismissing the complaint, as he did, he should have retained the cause in the Court, and should have sub-

mitted the same to the jury upon the question of damages for breach of said contract."

There are two reasons why this exception cannot be sustained. In the first place, his Honor, the Circuit Judge, was not requested to rule upon the question, and as he made no ruling upon it, it is not properly before

2 this Court for consideration. And, in the second place, the plaintiff was not entitled to both remedies, and, where he resorted to the remedy of specific performance, without objection on the part of the defendants, and the case was heard upon the merits, it would be an injustice to the respondents, to allow him to renew the contest, by seeking relief under the other remedy.

Judgment affirmed.

8917

TUCKER *ET AL.* v WEATHERSBEE *ET AL.*

(82 S. E. 638.)

FRAUDULENT CONVEYANCES. APPEAL AND ERROR. RESULTING TRUSTS. EVIDENCE. ADVERSE POSSESSION. LIMITATION OF ACTIONS. NOTICE. LACHES.

1. Where certain real property was conveyed by the vendor to a debtor's wife and she paid the purchase price out of her own separate funds, there was no resulting trust in favor of the husband which could be enforced by his creditors.
2. Where a husband conveyed certain real property to his wife, for an adequate consideration which she paid to him from her separate funds, and at the time of the transaction there were no suits pending or threatening against the husband by his creditors, the transaction was valid and could not be vacated by creditors subsequently obtaining judgment against the husband, on the ground that the conveyance was for the purpose of hindering, delaying, or defeating collection of their claims; there being no evidence of an intention to defraud.

REF.]

April Term, 1914.

3. Where a conveyance between relatives, such as husband and wife, is attacked as a fraud on the grantor's creditors, the burden is on the grantee to establish good faith by the fullest, clearest, and most satisfactory evidence.
4. Adverse possession arises only in controversies between parties seeking to recover possession of real property where, during the existence of the adverse possession, they had legal right in them to bring the action, and is therefore no defense to a suit in equity by creditors to set aside alleged fraudulent conveyances.
5. A suit in equity to set aside alleged fraudulent conveyances is within the six-year statute of limitations (Code Civ. Proc., section 137, subd. 6), and is barred within six years after creditors had knowledge of facts sufficient to put them on inquiry which, if developed, would have disclosed the alleged fraud.
6. Where certain alleged fraudulent conveyances were made in 1894 and 1896 and valuable improvements were placed on the property by the vendee, and the making of the conveyances could have been immediately ascertained by the exercise of the slightest diligence, creditors of the husband of the grantee were barred by laches from maintaining a suit instituted in 1910 to have the conveyances set aside.

Before SPAIN, J., Barnwell, April, 1913. Affirmed.

Action by George H. Tucker, Earl Sloan and Mary S. Sloan, administrator and administratrix of the estate of J. B. F. Sloan, assignees of the Edisto Phosphate Company, and J. D. Malsby, plaintiffs, against R. A. Weathersbee and E. E. Weathersbee, defendants.

The Circuit decree was as follows:

FOOTNOTE.—As to the running of the statute of limitations against actions to set aside fraudulent conveyances, see note in 4 Am. & Eng. Ann. Cases 1098; also, *Eigleberger v. Kibler*, 10 S. C. Eq. (1 Hill Eq.) 118; *Shannon v. White*, 27 S. C. Eq. (6 Rich. Eq.) 96; *Croft v. Arthur*, 3 S. C. Eq. (3 DeS.) 228; *Means v. Feaster*, 4 S. C. 249; *Richardson v. Mounce*, 19 S. C. 477; *McLure v. Ashby*, 28 S. C. Eq. (7 Rich. Eq.) 430; *Lott v. DeGraffenreid*, 31 S. C. Eq. (10 Rich. Eq.) 346; *McSween v. McCown*, 28 S. C. 342; *Harrell v. Kea*, 37 S. C. 369, 16 S. E. 42. As to the effect of public records as notice which will set statute of limitations running against action based upon fraud, see *Lott v. DeGraffenreid*, 31 S. C. Eq. (10 Rich. Eq.) 353; *Suber v. Chandler*, 18 S. C. 526, and note in 22 L. R. A. (N. S.) 208.

Succinctly stated, the pleadings developed an action brought by the owners of judgments, as plaintiffs, against one of the defendants, R. A. Weathersbee, to be set aside as fraudulent, under the statute of Elizabeth, as recognized at common law two deeds, one made by R. A. Weathersbee, a husband, to his codefendant, E. E. Weathersbee, his wife, on November the 5th, 1894, said deed conveying what is called the Jack Ashley lot; and another deed made to the wife, not by the husband, but by F. N. K. Bailey, on October 24, 1896, and conveying what is called the "Hotel lot." Both of these lots are in the town of Williston, on the line of the Southern Railway between Augusta and Charleston, in the county of Barnwell, a town of several hundred inhabitants. The charge as to both lots is that these conveyances were fraudulent, in that they were made to delay, hinder and defeat the creditors of R. A. Weathersbee; and as to the Hotel lot, that while the deed was made by a stranger to the wife, the purchase money was paid by the husband, and it is claimed that a resulting trust arose to the husband and that the property should be declared the property of the husband, and subject to the judgment of the plaintiffs and such other creditors of the husband who should come in and contribute to the expense of the proceedings. It seems that no other creditors have come in and contributed to the expenses of the proceedings. It seems that no other creditors have come in, and that the estate of Sloan, the assignee of the fertilizer company, and Malsby are the only creditors of the husband who are pushing the contention. The answer of the defendant, E. E. Weathersbee, the wife, denies the fraud charged; sets up the strict statute of limitations of ten years as to both tracts and claims the same by adverse possession; and also pleads the six years statute as to the alleged fraud.

As to the conveyances from Bailey to the wife of the Hotel lot, dated October 24th, 1896, there is not a tittle

REP.]

April Term, 1914.

of proof that any money of the husband went to pay the consideration of said deed, but there is ample and complete proof that the consideration was paid by the wife, named as the grantee in the deed, with money loaned to her by her brother, C. J. Owens, and that the improvements, amounting to some \$5,000, placed thereon from time to time, were made by her, in part by money borrowed and in part by money made by her own thrift and energy as a hotel keeper. There is no testimony to show that this deed was made to delay, hinder and defeat the creditors of R. A. Weathersbee; and I find as a matter of fact that the deed from Bailey to the wife conveyed to her, free from fraud, a fee simple title, and that said property

- 1 is hers, free and discharged from any claims of any of the creditors of the husband, R. A. Weathersbee.

There could be no resulting trust unless it was shown by clear evidence that the purchase price was paid by the husband, he being the common debtor of the creditors pressing this controversy.

As to the conveyance from the husband to the wife of the Jack Ashley lot, on November the 5th, 1894, I find as a matter of fact that said conveyance was made at a full,

fair and adequate price. This is shown by the tes-

- 2 timony of the witnesses of the defendant, and there is no testimony to the controversy on behalf of the plaintiffs. I further find that at the time this conveyance was made, the testimony does not disclose the fact that any suits were threatened against the husband or the partnership of A. J. Weathersbee & Son, in which he was concerned, or that any suits were pending against him, though it seems that afterwards judgments were obtained against him. I further find that the purchase price was paid by the wife, by money which she borrowed from her father. This is testified to by her and not contradicted or rebutted by any fact or circumstance, and the improvements made on this property, amounting to some \$3,000, in the shape

of brick stores, were made by her with money derived from other sources and from her own thrift and energy, notably from the sale of some property to Sprawls, which she purchased at a low price at public sale from the sheriff of Barnwell county as the property of her husband, the money paid to her by Sprawls amounting to \$1,200. Under these findings of fact and all of the testimony as to the facts and circumstances surrounding this transaction, the condition of the debtor husband, R. A. Weathersbee, and the condition of the grantee, his wife, I conclude as a matter of fact, that said deed from the husband to the wife is free from any charge of hindering, delaying and defeating the creditors of R. A. Weathersbee, and that said deed vested in said wife a fee simple title to said Jack Ashley lot, free and discharged from the claims of the creditors of said R. A. Weathersbee who are pressing this controversy.

The law upon this subject is clear and plain and is sustained by the authorities referred to by the counsel for the plaintiffs, and amounts to this: "That even if there was valuable consideration for a deed, yet if the deed was made, with the intent on the part of both parties, to defeat, delay and hinder their creditors in the collection of their demands," the law would not hold it valid. *Lowry v. Pinson*, 18 S. C. L. (2d Bailey) 324; *Archer v. Long*, 32 S. C. 186, 11 S. E. 86.

As to transactions between relatives, such as husband and wife, it is very plain that such relation being proven they are required to give "the fullest, clearest and most satisfactory evidence of good faith on the part of the parties concerned before it could be sustained." *Braffman v. Glover*, 35 S. C. 436, 14 S. E. 935.

Now, in this case, under the evidence, considering all the facts and circumstances, there is no testimony to sustain the charge of fraud. There may be some little contradictory statements in the testimony of Mrs. Weathersbee before the master under the supplementary proceed-

REP.]

April Term, 1914.

ings as compared with her testimony at the reference, but her testimony taken as a whole, with the exhibits accompanying the same, and the testimony of the other witnesses, and the testimony of her husband, who took the stand, gives a full, clear, and ample explanation of the entire transaction, and boiled down, the transaction is simply that of a debtor, not threatened with suit and with no suits pending against him, but in failing circumstances and in failing health, deeding to his wife, at a full and adequate price, a small lot in Williston, which has been improved considerably by that wife, openly, publicly, and notoriously claiming it as her own, and I cannot find that such transaction is a fraud, and to the contrary, I sustain the transaction under the facts and the law. The recent decision of our Supreme Court in the case of *V.-C. Chemical Company v. Hunter et al.*, 97 S. C. 31, 81 S. E. 190, in its contrast as to the facts in this case, is pertinent and throws lights on the transaction. In this Hunter case the transaction assailed was a deed from a brother to a sister, and against the brother at the time of the within transaction there were pending suits by creditors which were afterwards put into judgment, and other circumstances surrounding the transaction, which, considering the relationship between the grantor and the grantee of brother and sister, cast upon them the burden of proof of explaining the honesty of the transaction, but in the Hunter case they did not take the stand and explain the consideration and the honesty of the surroundings among themselves and to the world, and the Court, relying upon the case of *Bruffman v. Glover*, 35 S. C. 436, 14 S. E. 935, and other such cases, set aside the deed as a fraud. But in the case now under consideration there were no circumstances, such as the pendency of action and the holding of property by Weathersbee after the deed, which amounted to such badges of fraud as shifted the burden of proof, and Mr. and Mrs. Weathersbee took the stand and gave a full and

clear description and explanation of the reasons and facts for the transaction, which are satisfactory to the Court.

These findings, covering the contention made in the complaint and met by the general denial in the answer, disposes of the case, but it is the duty of the Court to consider and pass upon all questions raised by the pleadings and the evidence.

The contention raised by the answer of Mrs. Weathersbee, that she has been in open, notorious and adverse possession of the property in question for ten years and her plea of the strict statute of limitations for ten years

4 cannot be sustained. Adverse possession arises only in controversies between parties seeking to recover possession of real estate where during the existence of the adverse possession they had legal title in them to bring the action, whereas this action is an equitable action by creditors to set aside in equity alleged fraudulent conveyances.

The next defense set up by Mrs. Weathersbee is based upon the six-year statute of limitations, under subdivision 6 of section 137, Code of Civil Procedure, because, as is alleged, an action in equity is barred within six
5 years if the creditors had knowledge of facts sufficient to put them on inquiry, which would have developed the facts which they call a fraud. Or, in other words, knowledge of such facts as would have led to the knowledge of the fraud if pursued with reasonable diligence. *Smith v. Linder*, 77 S. C. 541, 58 S. E. 610.

I sustain this defense. Even if the facts developed and contended for as fraud constituted a fraud sufficient to set aside the deed or deeds in question, I find as a matter of fact from the testimony and the facts and circumstances surrounding the transaction in question, that the plaintiffs and their agents had knowledge of such facts as would have led to the discovery of the facts proven if pursued with reasonable care and diligence more than six years

REF.]

April Term, 1914.

before the commencement of this action, and consequently the action comes within the prohibition of the statute and cannot be sustained. I do not think that the mere fact of the recording of the deed to the Jack Ashley lot, under the authorities, was sufficient notice to put the creditors on inquiry. *Means v. Feaster*, 4 S. C. 249.

But there were facts and circumstances existing, and which were known to the creditors, or could have been known to them by the exercise of ordinary care and diligence, which, if they had been followed up would have developed the facts in the case, and that being the case, they are barred from bringing the action. *Brown v. Brown*, 44 S. C. 382, 22 S. E. 412; *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807.

Among the notorious facts and circumstances connected with the transaction, outside of the mere fact that the deed from the husband to the wife and the deed from Bailey to the wife were recorded, may be mentioned the following: The Jack Ashley lot was a small lot on a prominent street in the town of Williston, and next to the lot set off to R. A. Weathersbee as his homestead under proceedings by his creditors, which proceedings must have been known to all the creditors of Weathersbee, or by the exercise of the slightest diligence could have been known, and said proceedings would have shown the fact that there was a debtor who was claiming a homestead in a lot next door to the lot claimed by his wife, and which has been improved by the wife to the extent of \$3,000. The open and notorious ownership, not only of the Jack Ashley lot, but of the hotel property, was known to the world, and the testimony shows that the agents of these judgment creditors were visitors at Williston from time to time, and that all of these matters could have been easily ascertained. Besides this, all that is relied upon in the case to establish fraud is the testimony of Mrs. Weathersbee, obtained by her exami-

nation, under proceedings supplementary to execution, which could have been instituted years ago and said facts then obtained, and the slightest diligence would have suggested that a course should be taken, and it not having been taken for more than six years before the commencement of this action, must weigh against the plaintiff under this plea of the statute of limitations.

There is another view that must be considered. The potent and salutary doctrine of equity, that laches on the part of the creditors in enforcing their claims can,

6 and should, be applied by the Court of equity by its own motion, or upon the arguments of counsel, without being plead. *Wagener v. Sanders*, 62 S. C. 89, 39 S. E. 950; *Poston v. Ingraham*, 76 S. C. 171, 56 S. E. 780.

As stated by Chancellor Dunkin in *Smith v. Smith*, McMullan's Equity, page 134: "In regard to equitable titles, Courts of equity are to be considered as affected only by analogy to the statute of limitations. If a party be guilty of such laches in prosecuting his equitable title as would bar him if his title was solely at law, he shall be barred in equity." This doctrine is well sustained by other authorities. *Lott v. DeGraffenried*, 31 S. C. Eq. (10 Rich. Eq.) 346; *Mobley v. Cureton*, 2 S. C. 148; *Gregory v. Rhoden*, 24 S. C. 99.

Here is a case where the deeds were made, one on November 5th, 1894, the other on October 24th, 1896, and yet not until the latter part of 1910 was action brought by these creditors to set aside these transactions, notwithstanding the fact that in the meantime valuable improvements were openly and notoriously put upon this property, and it was occupied openly to the world by this wife, who was working to support her family, diligently, and known to the world as the proprietor of the property in question.

These facts and others which could be recited unquestionably show to the Court such laches as bars the plaintiffs

REF.]

April Term, 1914.

from the equitable relief asked in the complaint, and it is so held by the Court.

Wherefore, it is ordered, adjudged, and decreed that the complaint of the plaintiffs be, and the same is hereby, dismissed with costs.

T. H. SPAIN,

May 17, A. D. 1913.

Presiding Judge.

The plaintiffs appealed on the following exceptions:

1. That his Honor erred in holding that no part of the money of the husband (R. A. Weathersbee) went to pay the consideration of the deed to the Bailey lot, but that the consideration of the deed, therefore, was paid by the wife and the improvements were placed thereon by her; whereas, he should have held that the consideration paid for said lot, and the improvements thereon, was furnished by the husband, R. A. Weathersbee, and the deed made in the name of the wife as grantee to prevent its being reached by the creditors of the husband; and that said deed was made to hinder, delay, and defraud the creditors of the said R. A. Weathersbee, and his Honor erred in not so holding and decreeing.

2. That his Honor erred in holding that the testimony did not disclose the fact that any suits were threatened against the husband (R. A. Weathersbee) or the partnership in which he was concerned; whereas, the testimony disclosed, and the Court should have held, that obligations to the amount of several thousand dollars had matured and were maturing at the time of the conveyance of the Jack Ashley lot by R. A. Weathersbee to his wife, E. E. Weathersbee, and that suits were then pending against R. A. Weathersbee.

3. That his Honor erred in holding that the purchase price of the Jack Ashley lot was made by the wife to the husband by money which she had borrowed from her father, and that the improvements were made by her with money derived from other sources; whereas, the Court

should have held that said deed was absolutely without consideration and was made by the said R. A. Weathersbee to his wife, E. E. Weathersbee, for the purpose of hindering, delaying and defrauding his creditors, whose obligations had then, or were then, maturing, and that he was then in failing circumstances and insolvent, of which his wife had notice.

4. That his Honor erred in holding that the deed from the husband (R. A. Weathersbee) to his wife (E. E. Weathersbee) is free from any charge of hindering, delaying, or defrauding the creditors of R. A. Weathersbee, and that said deed vested in the said wife a fee simple title to the said Jack Ashley lot, free and discharged from the claims of the creditors of the said R. A. Weathersbee who are pressing this controversy; whereas, his Honor should have held (a) that even if a full and fair price had been paid by the wife to the husband for said lot, the said deed was void for the reason that she had notice of his failing circumstances, that his creditors were pressing and said deed was made and consideration passed with the intent and purpose on the part of both parties to place the said lot beyond the reach of his creditors, and with the intent to hinder, delay, and defraud creditors of the said R. A. Weathersbee.

5. That his Honor erred in sustaining the defense set up by Mrs. Weathersbee based upon the six-year statute of limitations, under subdivision 6, section 137 of the Code, as is alleged, an action in equity is barred within six years if the creditors had notice of facts sufficient to put them on inquiry which would have developed the facts which they call fraud; whereas, his Honor should not have sustained said defense, but should have held that there was no testimony showing, or tending to show, that the plaintiffs had any knowledge more than six years before the commencement of this action of such facts as would have led

REP.]

April Term, 1914.

to the discovery of the facts proven with reasonable diligence and care.

6. That his Honor erred in holding that the plaintiff had knowledge or notice of facts sufficient to put them on inquiry which would have developed the facts of the alleged fraud more than six years before the commencement of this action and are therefore barred.

7. That his Honor erred in holding that the plaintiffs were barred by laches in enforcing their claim or action against the defendants.

8. That his Honor erred in holding that the facts in this case show to the Court such laches as bars the plaintiffs from the equitable relief asked for in the complaint; whereas, his Honor should have held that the plaintiffs not having knowledge or information sufficient to put them on inquiry more than six years before the commencement of this action would not be barred under the statute of limitations on the law side of the Court, therefore, they are not barred by laches in this proceeding on the equitable side of the Court, having brought their action within the time required by the statute.

9. That it was error to hold that the plaintiffs could be barred in this action both by the six year-statute of limitations and by laches.

10. That it was error to hold that one is required to resort to judicial process to discover facts constituting fraud; whereas, he should have held that there were no facts proven in this case sufficient to put plaintiffs, as reasonable people, on inquiry, and should such facts have appeared from the testimony it was also apparent that there was no source from which they could derive the information of the facts other than from the defendants, and they being hostile to the plaintiffs, as appears from the testimony, no information could have been derived from them other than by judicial process, and the plaintiffs had a right, under the statute of limitations, to make a judicial

inquiry at any time during the life of their judgment, and his Honor should have so held.

11. That it appearing that R. A. Weathersbee was in failing circumstances, owing large sums of money, without visible means sufficient to pay the same, and having conveyed to his wife, and it appearing that judgments soon thereafter having been recovered to the amount of thousands of dollars, the burden of proof then shifted from the plaintiffs to the defendants, and Mrs. E. E. Weathersbee, the wife of R. A. Weathersbee, was then required to make a full and clear showing (1) that she had a separate estate, or means of acquiring property, and (2) that she paid a full and fair price for the property and was without knowledge or information sufficient to put her upon inquiry that her husband was conveying to her his property for the purpose of hindering and delaying his creditors, and his Honor should have so held.

12. That the defendants did not show fully and clearly that the defendant, Mrs. E. E. Weathersbee, had a separate estate, or adequate means with which to acquire this property, and it was not shown that she was without knowledge of the straightened circumstances of her husband, R. A. Weathersbee, at the time she acquired this property, and his Honor should have so held.

Mr. G. M. Greene, for appellant, submits: Burden of proof was shifted to wife to show that property conveyed to her was paid for with funds belonging to her separate estate: 1 Moore, Fraud. Conv., p. 39, sec. 6; 94 U. S. 580; 27 S. C. 425. Grantee knew of her husband's intent in making conveyances: Bump. Fraud. Conv. (4th ed.), sec. 2; 2 Bail. 324; 1 Hill 380; 97 S. C. 31. Burden also on grantee to show that creditor had notice of facts to put him on notice more than six years before action: 8 Rich. Eq. 155; Smith on Frauds, sec. 87; 101 U. S. 135; 44 S. C. 381. Evidence of grantee's knowledge of fraud:

REP.]

April Term, 1914.

4 S. C. 249. *Laches*: 2 S. C. 148; 6 S. C. 66; 10 S. C. 261; Smith on Frauds, sec. 249.

Messrs. Hendersons and Bates & Simms, for respondents, cite: *As to limitation of action*: 77 S. C. 541; 101 U. S. 135. *Laches*: McM. Eq. 134; 24 S. C. 99; 21 S. C. 124; 93 U. S. 55.

August 13, 1914.

The opinion of the Court was delivered by MR. JUSTICE GAGE.

The decree of the Circuit Court herein is full and comprehensive.

The appellants have failed to shake it. For the reasons therein stated that judgment is affirmed.

MR. JUSTICE FRASER concurs in the result.

8919

MORRIS v. BUIST ET AL.

(82 S. E. 675.)

COUNTY OFFICERS. COMPENSATION. STATUTES.

The salary provided for the sheriff of Barnwell county by 1 Civil Code, sec. 1486, is in lieu of the charges which otherwise might have been made against the county under the general fee bill contained in section 4280, and such fees are not chargeable against the county under the exception in section 1528.

Before GAGE, J., Barnwell, November, 1913. Affirmed.

Controversy without action on agreed statement of facts, by J. B. Morris, sheriff of Barnwell county, against H. F. Buist, J. W. Patterson and N. M. Walker, county commissioners of said county.

The facts are stated in the judgment of the Circuit Court, which was as follows:

"The sheriff of Barnwell county presented to the county commissioners a bill for \$590, the aggregate of fees charged by him against the county for the service of grand and petit jury. Vol. I, Code of Laws, 1912, Civil Code, sec. 4230.

"The commissioners doubt their liability therefor; they think that sections 1486 and 1528 of said Code, allow the sheriff a salary in lieu of fees.

• "Counsel for sheriff relies upon the last seven words of sec. 1528, as letting the sheriff fall back on section 4230 to make the charge.

"That section was the old fee bill, in force long years before the sheriffs were put on salaries.

"If the sheriff may enforce that section, as they did before the salary act was passed then what was the object of the salary act. Unless the \$1,500.00 voted as a salary was meant to stand in lieu of the items of the fee bill chargeable against the county, then it was a bonus.

"It is suggested by counsel that it may have been intended for compensation of the sheriff's deputy, for compensation of the sheriff's attendance upon Court, his service of subpoenas for witnesses in the Sessions Court, and other services.

"But the statute does not so read.

"It is true there seems to be no provision for the payment of the deputy sheriff, though there is warrant for the appointment of such an officer.

"That is a manifest hardship, both on the sheriff and on the deputy; but the only remedy is the enactment of a law to cure the omission.

"I am clearly of the opinion, that as the law now stands, the sheriff can claim compensation from the county only under sec. 1486 and sec. 1527; and that sec. 4230 is not an express provision for other and additional compensation.

"It is so ordered."

REF.]

April Term, 1914.

The sheriff appealed from said order, on the ground that the Circuit Judge erred in holding that sec. 4230 is not an express provision for other and additional compensation to the sheriff as contemplated by section 1528.

Messrs. Thomas M. Boulware and Edgar A. Brown, for appellant, submit: The Code of 1912 is to be construed as a single act, so as to give effect to all sections included therein: Acts of 1912, No. 414, p. 735; Const. 1895, art. VI, sec. 5; 66 S. C. 277; 75 S. C. 560. Provisions of Code as to compensation of sheriffs: Secs. 1486, 1527, 1528 and 4230. 70 S. C. 391, distinguished.

Mr. R. C. Holman, for respondent, cites: 70 S. C. 390 and 25 Stats. at Large 572, Act No. 270, as original of Code, sec. 1528, and showing legislative intent.

August 19, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

The judgment of the Circuit Court is affirmed for the reasons therein stated.

MR. JUSTICE GAGE, having heard this case on the Circuit, did not sit on the hearing of the appeal.

8921

CHAMPION v. HERMITAGE COTTON MILLS.

(82 S. E. 672.)

MASTER AND SERVANT. DISCHARGE. PENALTY FOR DELAY IN PAYMENT OF WAGES. EVIDENCE.

1. Testimony as to the custom in a mill as to working days by employees, held relevant on issue as to whether or not an employee had voluntarily quit his employment or had been discharged by his employer.
2. Compensation of an employee according to the amount of work performed, held wages within the meaning of Civil Code, sec. 3812, requiring the wages of discharged laborers to be paid to the time of their discharge by corporations.

Before MEMMINGER, J., Camden, November, 1913.
Affirmed.

Action by John Champion against Hermitage Cotton Mills to recover \$7.94 wages, and \$100.00 penalty for non-payment of such wages by the defendant within time limited by Civil Code, sec. 3812. From judgment for plaintiff, the defendant appeals. The facts are stated in the opinion.

Mr. W. B. deLoach, for appellant, cites: 96 S. C. 4.

Messrs. J. C. Hough and *M. L. Smith*, for respondent.

August 24, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

Plaintiff recovered judgment against defendant in the Court of a magistrate, which was affirmed on appeal to the Circuit Court, for \$100.00, the accumulated penalty provided by statute (Civ. Code 1912, sec. 3812) for the failure of defendant to pay plaintiff the wages due him on demand after he was discharged.

REF.]

April Term, 1914.

One of the issues was whether plaintiff was discharged or voluntarily quit the service of defendant. Plaintiff testified that, prior to August 28, 1913, the date of his discharge, he had been in the service of defendant for

1 about eighteen years, and he was familiar with the customs of the mill, one of which was that, if an employee dropped out for a few days, a spare hand was put in his place, and when the regular employee returned, he resumed his place; that, under this custom, staying out for a few days did not mean that an employee had quit the service; that he stayed out on Monday, the 18th of August, 1913, to go to see his son, who, he had been informed, was sick; that he did not intend to quit the service of defendant; that, before he got very far he was arrested on the charge of having liquor in his possession and brought back to Camden; that he gave bond, and reported at the mill for duty the next morning, Tuesday, and found another in his place; that the overseer told him he could not give him work; that the superintendent asked him when he was going to get out of the house that he was in. The superintendent also testified that he asked him to vacate the house that he was in. This was ample evidence of plaintiff's discharge, and we see no objection to the proof of the custom, as testified to by plaintiff.

There was no dispute as to the amount due plaintiff. The only other question is whether plaintiff was a laborer for wages, so as to bring him within the provisions

2 of the statute. He testified that he was paid according to the number of "hanks" he made. Wages may be measured by the piece, as well as by the time employed. 40 Cyc. 240.

Judgment affirmed.

8922

EX PARTE COLEMAN ET AL.
IN RE ESTATE OF RICE, DECEASED.

(82 S. E. 674.)

EXECUTORS AND ADMINISTRATORS. COMMISSIONS. ACCOUNTING. CHOSSES
IN ACTION. APPEAL AND ERROR.

1. Executors are not entitled to commissions on moneys paid out and received in operating farms on lands belonging to testatrix, after the current year in which she died, through agents employed by them, and paid out of the funds of the estate.
2. The legal title to chosses in action acquired by executors is in them, and an assignment to them is unnecessary when they are held personally liable to the estate for funds due thereon.
3. Executors are chargeable with funds of their estate advanced to a tenant upon the lands of the estate, and not repaid.
4. Exceptions not argued will be deemed abandoned.

Before DEVORE, J., Union, September, 1913. Affirmed.

Appeal by William Coleman and F. M. Farr as executors of the estate of Annie E. Rice, deceased, from a decree disallowing credits claimed by them in their final return.

Messrs. Shand, Benet, Shand & McGowan, for appellants, submit: *Executors properly worked lands of the estate*, 1 McC. Ch. 338, 1 Rich. Eq. 12, *and are entitled to commissions on such transactions*: 4 DeS. 110, 39 S. C. 253, *distinguished*.

Messrs. J. P. K. Bryan and McDonald & McDonald, for respondent, cite: 39 S. C. 247 to 253; 13 Rich. Eq. 201; 1 DeS. 542; 1 McC. Ch. 5, 6 and 7.

August 24, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

REP.]

April Term, 1914.

Appellant's testatrix died in August, 1908, leaving a large estate, especially in farm lands, which were situated in three or four different counties. The executors continued the farming operations during the years 1909, 1910 and 1911, just as testatrix had in her lifetime.

On final settlement, the probate Court allowed them commissions on their receipts and disbursements in connection with the farming operations for the first year, 1908, but held that they were not entitled to commissions on

1 those of the other years, on the ground that it was not their duty to continue the farming operations after 1908, and, also, on the ground that they had employed agents to attend to that business and had paid them out of the funds of the estate. The ruling was correct.

It appears that one C. H. Rice bought lands of the estate from the executors and gave them his bond for the purchase money, which was secured by mortgage of the lands.

On settlement, this bond was charged to the executors. They assign error in that the Court did not
2 order a formal assignment of the bond and mortgage to them. No formal assignment is necessary. The bond and mortgage are payable to them, and they have the legal title thereto and the right to collect the amount due thereon, just as they had before the settlement. The decree merely makes them personally liable to the estate for the amount due thereon.

They advanced money of the estate to a negro tenant, named E. Littlejohn, and took his note therefor, which has not been paid. This note was properly charged to them.

The exception assigning error in not correcting the amount found to be due on the note of R. V. Gist, which was charged to the executors, appears to have been abandoned, as it was not argued. At any rate, there is nothing in the record to support it.

Judgment affirmed.

8923

STATE v. BARNETT.

(82 S. E. 795.)

CRIMINAL LAW AND PROCEDURE. CHANGE OF VENUE. AFFIDAVITS.
TRIAL. CONTINUANCE. APPEAL AND ERROR. CONTEMPT. ATTOR-
NEYS. JURY FEES. SENTENCE. MAGISTRATE. BREACH OF TRUST.

1. An affidavit to obtain a change of venue, must state the facts relied upon as ground of motion, and, if, upon information and belief, also the sources of information and grounds of belief, with such definiteness, particularity and certainty, as would afford the basis of an indictment for perjury, if the affidavit be false, and would enable the Court to determine their sufficiency.
2. Rulings of a magistrate on a former trial, reviewable on appeal, do not afford basis for motion to obtain a change of venue on the ground of prejudice of the magistrate.
3. A continuance is properly refused when asked to obtain time to move for a writ of mandamus, to which the party is not entitled, because of his remedy by appeal.
4. There is no abuse of discretion in refusing continuance for absence of defendant's witnesses, he having had ample notice of trial, and simply relied on his belief, in which he was mistaken, that change of venue would be granted.
5. Where a charge of contempt against a member of the bar involves his professional conduct, and charges a lack of respect on his part for constituted authority, the Court on appeal will review the charges, which are not speculative, although the sentence for contempt may have been served by the attorney charged.
6. An attorney filing an affidavit charging a magistrate with directing a constable to influence a juror, and with being prompted by malice and improper motives in his rulings, without stating the facts with such definiteness as would warrant the inference, if they were true, that the charge was well founded, is guilty of a contempt of Court.
7. A sentence by a magistrate of 24 hours imprisonment for a contempt of Court is excessive.
8. A refusal of a magistrate to accept an appeal bond and stay proceedings, on appeal from a judgment for contempt is error.
9. A defendant in a criminal case cannot be required to pay jury fees or costs on demanding a trial by jury, to which he is entitled under the Constitution.
10. It is improper for a magistrate to argue a cause on appeal, in support of the judgment rendered by him, and which should be considered upon the return made by him to the appellate tribunal.
11. It not appearing what contract existed between an attorney and client for the former's compensation, and it appearing that the

REP.]

April Term, 1914.

attorney had attended to other matters for the client, and when called upon for money collected, stated that the client was indebted to him for professional services to an amount as great as that which he had collected, and that as soon as he had collected the entire claim, he paid it to a third party for the client, and so notified the latter, a verdict of not guilty should have been directed on the charge against the attorney of breach of trust with fraudulent intent.

Before MOORE, J., Monck's Corner, March, 1914. Reversed.

The defendant, Nathan Barnett, being convicted in a magistrate's Court of a contempt of Court, and of a breach of trust with fraudulent intent, appealed to the Court of General Sessions for Berkeley county, which affirmed the judgment of the magistrate. From this judgment, he appeals. The facts are stated in the opinion.

Mr. Nathan Barnett, in *pro. per.*, for appellant.

Mr. Solicitor Hildebrand and *Mr. Edwards*, for respondent.

August 24, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

In October, 1913, the prosecutor, D. Riff, a merchant of St. Stephens, employed defendant, who is an attorney at law, to collect certain claims, one of them being against a colored laborer, named Clark, for \$10.37. Defendant saw Clark and agreed to accept monthly payments, until the claim was paid. On November 12, Clark paid defendant \$6. On December 11, not being able to find defendant, he

FOOTNOTE.—As to contempt of Court by incorporating scandalous or disrespectful language in brief, see note in 9 Am. & Eng. Ann. Cases 168; in petition for change of venue, see 9 L. R. A. 566; attorney's statements in Court concerning decisions, 5 L. R. A. (N. S.) 916.

paid G. Rittenberg, a merchant of St. Stephens, \$4 for defendant. About that time, defendant received for collection a claim against Riff, and, on his failure to pay it, sued him in the Court of Magistrate Wilder. The case was tried December 17, and judgment went against Riff. Immediately after the rendition of the verdict, Riff swore out a warrant before Magistrate Wilder for defendant charging him with breach of trust with fraudulent intent in the collection and misappropriation of the money due him by Clark. Thereafter, on motion of Riff, the venue was changed to Magistrate Edwards, on the ground that Magistrate Wilder was a material witness for the prosecution.

In the meantime, on December 30, Clark paid defendant 37 cents, the balance due by him to Riff, and exhibited to defendant Rittenberg's receipt for the \$4 paid to him, explaining why he had paid the money to Rittenberg. On the same day, defendant, having collected the full amount due by Clark, left with John Klintworth, a merchant of St. Stephens, for Riff, the amount due him out of the Clark collection, with request that he notify Riff that he had the money for him, and that he could get it by calling for it. Defendant also requested Magistrate Wilder to notify Riff to the same effect. Riff was so notified, and called at the store of Klintworth the same day, but refused to take the money. Defendant left the money with Klintworth instead of paying it to Riff in person, because he and Riff were not on speaking terms, on account of his having sued Riff.

When defendant's case was called for trial, on January 20, he demanded a jury. The magistrate told him he would have to put up three dollars to pay the jurors. At first he refused, but, on being told by the magistrate that he must do so, he paid it, under protest. The result was a mistrial, the jury having failed to agree.

After the trial, defendant was informed by one of the jurors that the magistrate's constable, who had summoned him, had attempted, on the way to Court, to influence him

REF.]

April Term, 1914.

against defendant. He was also informed that the constable had publicly declared that, at the next trial of defendant, he could get a jury, outside of St. Stephens, which would convict him in five minutes. Thereupon defendant prepared an affidavit for a change of venue, and sent it to Magistrate Edwards, who replied by letter, dated February 7, that the motion would have to be made in open Court, at Bonneau, on February 10, at which said place and time the case was set for trial. The record discloses no reason for changing the place of trial from St. Stephens to Bonneau.

On February 10 defendant appeared and presented his affidavit in support of his motion for a change of venue, wherein he affirmed that he believed Magistrate Edwards was biased and prejudiced against him, and that he did not believe that he could get a fair trial before him, for the following reasons:

"1st. That the said magistrate had expressed his opinion to several persons unfavorable to the defendants herein.

"2d. That under the direction of said magistrate, his official constable, while in charge of a juror, attempted to influence said juror against the defendant.

"3d. That said magistrate, contrary to law, refused to direct a verdict for the defendant herein, where all the evidence of the prosecution in the case failed to prove that a crime as charged in the indictment was committed, and that the defendant was guilty of the crime as charged or any other crime.

"4th. That said magistrate maliciously prevented the defendant from showing at the trial the real motive of the prosecutor for obtaining the warrant against the defendant and causing his arrest.

"5th. That said magistrate, at the trial of the case, unfairly admitted evidence that was irrelevant and immaterial to the issue, but which tended to confuse the jury and was prejudicial to the defendant, and thereby preventing the

jury from obtaining the real and true facts in the case, and thereby preventing the jury reaching a verdict in said case.

"6th. That the foreman and other members of the jury informed the defendant that the magistrate was very unfair and partial against the defendant and was biased against the defendant throughout the trial of the case.

"7th. That said magistrate, without any warrant of law and contrary to the express provisions of the Criminal Code, compelled the defendant herein to pay the sum of three dollars as a jury fee, thereby extorting from the defendant money against his will and against the laws of South Carolina.

"8th. The defendant is informed that the said magistrate has a personal motive in finding the defendant guilty of the alleged charge, although the defendant is innocent of the alleged criminal charge against him, and that there is no legal evidence to substantiate even a color of a criminal charge against the defendant herein."

As soon as the affidavit was read, the magistrate told defendant that he was in contempt of Court for presenting it, and imposed sentence therefor of imprisonment in jail for twenty-four hours, or the payment of a fine of twenty dollars, and overruled his motion for a change of venue.

Defendant then moved for a continuance, to give him time to apply to a Circuit Judge for a writ of mandamus to compel the change of venue, which was refused. He then moved for a continuance of one day, stating that he had appeared solely for the purpose of moving for a change of venue, and had not brought his witnesses, and was, therefore, not prepared for trial. This motion was also refused, and the trial was ordered to proceed. A jury was empaneled, which, after hearing the evidence and after deliberating four minutes, returned a verdict of guilty. From the sentence on the verdict, as well as from that for contempt, the defendant appealed. Notwithstanding his appeal, and his offer to give bond pending the appeal from the sentence for

REP.]

April Term, 1914.

contempt, the magistrate refused to accept bail, and committed defendant to jail, and he served the term of imprisonment for contempt.

Defendant represented himself in the Courts below and in this Court. The record, as presented to this Court, is very badly prepared. There is such confusion of statement, complaint and argument, in the record and grounds of appeal, and so much contradiction involved, that it has been difficult to analyze it, and clearly state the issues properly before the Court.

Consideration of the grounds of the motion for change of venue shows that they do not meet the requirements of the statute, as interpreted by this Court, in that they do not state facts sufficient to disqualify the magistrate in

1 such manner that, if the facts stated were false, the affidavit would form the basis of an indictment for perjury. *State v. Conkle*, 64 S. C. 71, 42 S. E. 173; *Bacot v. Deas*, 67 S. C. 248, 45 S. E. 171; *Witte v. Cave*, 73 S. C. 17, 52 S. E. 736; *Mayes v. Evans*, 80 S. C. 362, 61 S. E. 1068. In *Bacot v. Deas*, the Court said: "That case (*McNair v. Tucker*, 24 S. C. 105) intimates that judicial officers ought to be protected against capricious statements by parties that they are unfair, prejudiced, or otherwise disqualified from hearing a cause. In other words, it seems clear that the purpose of requiring the grounds to be stated was to place some responsibility and fix some obligation upon the affiant. The law does not provide that the grounds should be such as would convince the magistrate, and the reason, we think, for requiring them to be stated is to prevent arbitrary and capricious charges of prejudice; and to this end, it seems to me, the law contemplates that the affidavit shall contain such statements as would form the basis of an indictment for perjury." These cases show that, to satisfy the statute, the grounds upon which a change of venue is asked for must be stated with such definiteness and certainty that the Court can determine their sufficiency;

and, if facts are stated on information and belief, the sources of information and the grounds of belief must be stated with particularity and certainty, otherwise the Court cannot determine the sufficiency of the grounds, nor would the affidavit, if false, afford the basis of an indictment for perjury.

Another reason why some of the grounds are insufficient is that they are based upon rulings of the magistrate

2 in the first trial, which, if erroneous, could have been corrected on appeal, if the jury had found defendant guilty.

There was no reversible error in the refusal of defendant's motion for a continuance. The continuance

3 asked for to enable him to apply for a writ of mandamus was properly refused, because his remedy was by appeal. The granting or refusing of the motion based on the absence of his witnesses was within the discretion of the magistrate, and we cannot say that it was abused, because defendant had ample notice of the trial. His misfortune was that he relied with mistaken confidence on the granting of his motion for change of venue.

The Circuit Court declined to consider the exceptions, assigning error in finding defendant guilty of contempt of Court, in the sentence imposed therefor and in committing him to jail, notwithstanding his appeal therefrom

5 and offer to give bond pending appeal, on the ground that, the sentence having been served, the questions presented by these exceptions were speculative. But the questions were not speculative, and should have been decided, especially as they involved the right of the magistrate to imprison defendant under the circumstances, and the conduct of the defendant as a member of the bar.

It is of the utmost importance to the commonwealth that the integrity, authority and dignity of all Courts should be

REP.]

April Term, 1914.

maintained and respected. It is especially the duty of members of the bar, who are licensed to aid in the administration of justice, to inculcate in others, both by practice and precept, due respect for constituted authority. Those who preside in Courts of justice are in duty bound to demand and enforce due respect for their official acts and station. To offer indignity or insult to a Judge presiding in Court is to set at defiance the authority of the law and bring it into reproach and contempt. Such conduct should not be tolerated.

When defendant charged Magistrate Edwards with directing his constable to influence a juror against him, and with being instigated by malice and improper motives in his rulings, he made very serious accusations. He

6 should at least have stated the facts upon which they were founded with sufficient definiteness to warrant a reasonable inference that, if the facts stated were true, the charge was well founded. Having failed to do so, he was properly held to be guilty of contempt of Court.

But the magistrate exceeded his authority and erred in imposing on defendant a sentence of twenty-four hours imprisonment. The statute (Civ. Code, sec. 1397)

7 which gives magistrates authority to punish for contempt limits the punishment to "fine and imprisonment, either or both, not exceeding twenty dollars fine, and twelve hours imprisonment."

The magistrate also exceeded his authority and erred in sending defendant to jail, after he had appealed from the sentence and offered to give bond, pending the appeal.

8 Having offered to give bond, his appeal operated as a supersedeas. Crim. Code, sec. 100; *In re Stokes*, 5 S. C. 71; *State v. Nathans*, 49 S. C. 199, 27 S. E. 52.

The magistrate also erred when he required defendant to pay the jurors. The Constitution guarantees the accused in criminal cases the right of trial by jury. If the legisla-

ture has made no provision for paying the jurors, the
9 inference is that it was intended that they should
serve without pay. When a defendant in a criminal case demands a trial by jury, he should not be embarrassed, nor should his case be prejudiced by his being called upon to pay the jurors.

The next complaint of appellant is that the magistrate appeared and argued the case against him in the Circuit Court. It was not proper for the magistrate to argue the case in support of his own judgment. No doubt he
10 felt justified in doing so on account of the grave charges made against him by the appellant. But he should have been content to let the judgment of the Circuit Court as to his conduct of the trial be rested upon his return, which should have contained a true and correct account of the proceedings in his Court; for it will be presumed, until the contrary is clearly made to appear, that those vested with judicial authority exercise it fairly and impartially, and with becoming poise and dignity.

The testimony does not warrant the inference that defendant was guilty of the crime charged. At the time the warrant was sworn out, he had collected only \$3.00 of the amount due by Clark. It does not appear that con-
11 tract, if any, there was between him and the prosecutor as to the compensation which he was to receive for his professional service. It does appear that, besides the claim against Clark, he had been employed in other matters by the prosecutor, and it does not appear what contract, if any, there was between them as to his compensation for those matters. It does appear that when he was called upon to pay the amount which he had collected on the Clark claim, he stated as his reason for refusing to do so, that the prosecutor was indebted to him for professional services in an amount as great as that which he had collected. If that were true, he was entitled to retain what was due him. It also appears that, as soon as he collected the whole of the

REP.]

April Term, 1914.

Clark claim, he paid the amount due the prosecutor to Klintworth for him, and had him notified of the fact.

Under the facts and circumstances detailed in the record, a verdict of not guilty should have been directed, as the mere failure to pay the money collected was no evidence of a fraudulent intent (*State v. Butler*, 21 S. C. 353), and there is nothing else tending to prove such intent.

Judgment reversed.

MR. JUSTICE FRASER concurs in the result.

8924

TWIGGS ET AL. v. WILLIAMS ET AL.

(82 S. E. 676.)

APPEAL AND ERROR. CASE. CONTRACTS. EVIDENCE. CONSTRUCTION.

1. The rule governing preparation of the case on appeal, restated, and the bar warned that cases not prepared in accordance with the rule, are not entitled to consideration.
2. Where reference is made in a written contract to a prior conversation for the purpose of confirming so much as is included in the written contract, the portions of the conversation not so included are not a part of the contract, and testimony as to them is inadmissible.
3. A subcontractor agreeing to sign the same kind of a contract with the principal contractor, as the latter has with a railroad company, adopts the provisions of the latter contract as to the supervision of the work by the railroad engineer, methods of computation and methods of settlement, and is estopped to say that he did not know or understand such terms.
4. A contract providing that grading shall include all excavations and embankments, to be paid for one way only, according to the largest quantity, and there being no terms limiting excavations to those within the limits of the roadbed, the subcontractor is entitled to compensation for all excavations necessarily made in the performance of the contract, whether within or without the limits of the roadbed.

Action by A. J. Twiggs and J. D. Twiggs, partners under the firm name of A. J. Twiggs & Son, against W. Z. Williams, W. A. Young and A. P. Cornell, partners, doing business under the firm name of W. Z. Williams & Co., and J. S. Bowers. From a decree modifying the judgment recommended by the master, the defendants appeal.

The master's report was as follows:

To the Honorable, the Court of Common Pleas:

Briefly stated, this cause was referred to me for an accounting between the parties, and to report to the Court my conclusions of law and fact.

The testimony taken is herewith submitted, in pages numbered 1 to 544, inclusive, together with the exhibits therein referred to. The stipulations entered into as the hearing progressed, pages 303 to 304, have eliminated from the contest a number of the items shown in their respective accounts, and made irrelevant a large part of the testimony taken.

The contested items must be allowed or disallowed upon consideration of the testimony relevant thereto, as governed by the contract between the parties on which the work was awarded and undertaken.

It must be first determined what that contract was.

The defendants, Williams & Co., as railway contractors, were awarded a contract by the Atlantic Coast Line Railway Company to do certain work in double-track and yard construction in the vicinity of Charleston. The yard construction was then undertaken by the plaintiff, as subcontractors, the scope and detail thereof having been discussed by members of the respective firms, on the ground, prior to the awarding of the contract.

May 17, 1910, Williams & Co. wrote Twiggs & Son (Plaintiffs' Exhibit "A"), as follows:

"Confirming previous conversation and the conversation today with your Mr. A. J. Twiggs, also wire from Wil-

Rep.]

April Term, 1914.

mington, beg to advise that we will give you contract for all the grading, tracklaying and switches at Bennett Yards, near Ashley Junction, at the following prices: For grading, 22 cents per cu. yd., one way.

Tracklaying and surfacing without ballast, \$450 per mile.

Tracklaying and surfacing with ballast, R. R. Co. to furnish ballast and dump it in center of track, you to do the spreading, \$495 per mile.

Putting in switches, \$22.50 per set.

It is distinctly understood that this contract is awarded you with the understanding that you are to do it on contract time, and that you will sign same kind of contract with us as we have with the Atlantic Coast Line."

May 20, 1910, Twiggs & Son wrote Williams & Co. (Plaintiffs' Exhibit "B"), as follows:

"Yours of the 17th, covering agreements made on the Bennett Yard, near Charleston, S. C., received. Terms are satisfactory. We are waiting on the two flat cars to be placed at Savannah River to load material and shovel parts and transportation to Charleston," etc.

There is a conflict of testimony as to what was said between the parties at the time of the conversations prior to Williams' letter of May 17, 1910, and I have been unable to reach a conclusion that there was such a mutual understanding between the parties as a result of these conversations as to amount to a contract, except the agreement as to prices to be paid, which is not disputed.

I find that Twiggs & Son were experienced railroad contractors, and knew, or should have known, in at least a general way, the usual terms of a contract of this nature—supervision by the railroad engineer, method of computation and manner of settlement. Having agreed to sign with Williams & Co. "the same kind of contract" as Williams & Co. had with the Atlantic Coast Line, they began the work with that distinct understanding and were bound by all of its terms, except as to prices and scope of work to be done

by them, and cannot now invoke the previous conversation relating to the work save to the extent that the same may explain any ambiguity growing out of the changes in the wording of the contract made necessary by the limit of the work awarded to them.

This, I think, was the legal status when plaintiffs started the work without first requiring the production of Williams of his Coast Line contract for comparison. Had this been done, the principle laid down in the case of *Pratt v. Hudson River R. R. Co.*, 21 N. Y. 309, might have been invoked in defending an action for nonperformance. As I conceive the situation here, this decision does not apply. Performance is obligatory where the contract is well understood. One who undertakes to perform under an uncertain or ambiguous contract is bound by a reasonable construction of the contract and cannot, after performance, or in the course of performance, insist on his understanding as opposed to the understanding of the other party to the contract. And particularly is this true where, as in the case at bar, certain clauses of the contract submitted for signature were relied on and invoked, and other clauses acquiesced in, such as involved computations, estimates, extra work, etc.

This brings us to a consideration of the contract between Williams and the railroad (Defendants' Exhibit "6"), and the contract submitted by Williams to Twiggs for signature (Plaintiffs' Exhibit "C"). Wherein do they differ?

I find that the only material difference for consideration here is found under the head of "Grading." Williams was to do double-tracking as well as yard construction work under his contract, and was to be paid for both excavation and embankment "by roadbed measurement" at 18½ per cubic yard. It was clearly understood that Twiggs, under his subcontract for the Bennett Yards work, was to do both excavation and embankment, and was to be paid "one way only" at the rate of 22c. per cubic yard. I find that the term "one way only" was properly set out under

REF.]

April Term, 1914.

the head of "Grading" in the copy contract submitted by Williams to Twiggs (Plaintiffs' Exhibit "C") as "either for excavation or embankment, according to the largest quantity." It was not stipulated by Williams that the grading measurement was to be "roadbed measurement," and I find, in the absence of such limitation, that plaintiffs were entitled to compensation at the agreed rate per cubic yard for either excavation or embankment, which ever was the largest quantity, the term "one way only" limiting the payment so that same could not be figured on both excavation and embankment; and that the limitation was not to the excavation and embankment done within the roadbeds limits as it was under the contract between Williams and the Atlantic Coast Line.

Another question at issue is whether or not, in accordance with the conversations and under the terms of the contract submitted, Twiggs, as subcontractor, was to furnish surfacing material at his own expense and lay the same under the agreed item for "tracklaying and surfacing without ballast" at \$450 per mile. Williams' letter of May 17, 1910, does not say in so many words that the contractor was to furnish surfacing material. Mr. Twiggs says that Mr. Williams did not so inform him in the course of conversation. Both contracts, however, provided that surfacing material was to be furnished, delivered and put in place by the contractor at his own expense. And I find further, from the testimony, that tracklaying and surfacing "cannot be made complete without the necessary material." Track "laid and surfaced" must be at true line and level and thoroughly tamped, and this I find to mean placing and packing of the dirt under, at the ends, and between the cross-ties.

During the progress of the work the plaintiffs secured advances in money from the defendants, Williams & Co., for which they gave their several promissory notes, as set out in the complaint, and to secure the same executed and

delivered to the said defendants a chattel mortgage on one Bucyrus steam shovel. Williams & Co. refused to make further advances, and, on the — day of December, 1911, plaintiffs notified Williams & Co. that they were unable to complete the work for lack of funds, and same was taken over by Williams & Co. for the account of the plaintiffs and carried to a conclusion under their superintendence and management, by the use of the plant and forces which plaintiffs had theretofore employed in pursuance of the contract.

On the 13th day of February, 1911, Williams & Co., having completed the work called for under the contract, submitted to Twiggs & Son a statement of the account. It is contended that Mr. A. J. Twiggs' letter of February 15, 1911, acknowledging this statement as correct except in a few minor particulars, is a bar to the plaintiffs requiring any further accounting for the period covered, and an acknowledgment of the correctness of the account submitted. I cannot so find. The account is based on monthly estimates, and it seems to have been clearly recognized by both sides that it was subject to examination and correction before the final settlement. The submission by the plaintiffs of their statement of the account at the time fixed by Williams & Co. for a final conference and settlement shows that they reserved and insisted upon the right to a strict accounting.

The plaintiffs claim several large items as due them for extra work made necessary by changes in grade and other changes in plans alleged. Both contracts are very clear on the method by which and the time at which claims for extra work, known as "force account," should be made. This method was recognized by both parties as to numerous items, and I find that under the contract plaintiffs cannot recover for such items held over for some time after having left the work, and after final estimate—based upon engineer's monthly estimates and extra compensation allowed—had been submitted

REP.]

April Term, 1914.

It is a fair inference from the testimony that the plaintiffs, partly because of lack of more suitable equipment, and partly, perhaps, because of lack of sympathy and co-operation on the part of the engineer force, did do certain work that entailed upon them the extra and ordinarily unnecessary expense. I am not satisfied that this work would have been compensated for if claim had been made in the form of force account at the proper time. However that may be, it is beyond question that plaintiffs failed to take the proper steps from time to time to protect the rights they now claim under the contract.

In stating the account, between the parties, I am met at the outset with a matter of great difficulty. I have concluded that under the contract between Twiggs and Williams the engineer of the Atlantic Coast Line was to figure the amount of work done and that his figures were to be accepted as final. This, however, on the assumption that the engineer was to make his calculations and estimates on the contract between Twiggs and Williams in addition to and entirely independent of his calculations and estimates on the contract between Williams and the Coast Line. But Mr. Nichols, who was the representative of the Atlantic Coast Line on the work, and was also, so far as the plaintiffs are concerned, the representative of Williams & Co., testifies very positively that at no time did he consider the work on the Bennett Yards as any other than a "two-way" contract, and that all of his measurements and estimates were made on that basis. It might be of assistance in determining the quantities if the Court were in possession of the original estimates of the Bennett Yards work as made by Mr. Nichols for the monthly settlements between the Coast Line and Williams & Co. These not being available, we must endeavor to reconcile the difference in the final figures as made by Mr. Nichols and Mr. John D. Twiggs. Twiggs claims from his measurements that he should be allowed for 106,019 cubic yards of excavation, at

22c. per cubic yard, exclusive of allowance for the muck-hole. Nichols figures the proper allowance for excavation, including (as does Twiggs) the borrow pit, and exclusive of the muck-hole, 86,039 yards. In these figures Twiggs allows for the borrow pit 36,463 yards, while Nichols allows 29,868. As both calculations are based on an assumption as to the surface elevation before cutting, I think it fair to divide the difference of 6,595 yards, and deduct from Twiggs' claim of 106,095 yards, for that reason, 3,298 yards, leaving his figures at 102,721 yards. There should be a further deduction from Twiggs' figures for surfacing material, which I find plaintiffs were, under the contract, to furnish and put in place. Taking from the testimony an average of 700 yards per mile for necessary surfacing material, for 14.85 miles, this would amount to 10,395 yards, which would leave 92,326 yards, subject to a further deduction for material wasted, say 4,000 yards, leaving 88,326 yards of excavation to be compensated for at 22c. per cubic yard.

No question is made as to the number of miles of track laid, nor the number of switches or the allowance therefor.

As to the muck-hole item, I think the plaintiffs should be allowed the 1,464 yards at 22c., amounting to \$324.08, and the \$150 for extra compensation. There is some conflict of testimony as to whether this was agreed upon. Williams allowed it and then charged it back by a cross entry, claiming that the Coast Line wouldn't allow it and that the credit was made in error. Mr. Nichols' testimony, however, shows that Williams & Co. were paid for this work by a "two-way" allowance of 1,624 yards at their contract price. It is proper that Twiggs should have compensation for it on some extra basis. Under the testimony, that was the usual method adopted when work of this character was encountered, and both Twiggs and Williams did agree on the amount claimed as fair.

REP.]

April Term, 1914.

I find that Twiggs & Son are entitled to the items charged on their corrected statement of March 10, 1911, under the head of force account items, except the rail-bender charge and the charge for unloading material, which was withdrawn. I find that they are also entitled to recover \$42.30 freight paid on engine which was to have been dead-headed back to them at Augusta.

I find that the plaintiffs are not entitled to recover any of the items charged under the head of additional expense for laying track, handling dirt and filling, nor for labor raising tracks caused by change in grade.

I find the amounts properly chargeable by the plaintiffs and for which they are entitled to recover from Williams & Co., as follows:

Total excavations, less proper deduction, 88,326	
cu. yds. @ 22c. per cu. yd.....	\$19,431 72
Amount to be added by agreement recorded on	
page 304 of testimony.....	38 70
	<hr/>
	\$19,470 42
Less dirt sold, p. 531 of testimony.....	36 08
	<hr/>
	\$19,434 34
Track laying—14.85 miles at \$450.....	6,682 50
74 switches @ \$22.50 each.....	1,665 00
Force account, September	67 92
November	49 02
December	48 29
.....	52 00
January	12 00
.....	16 77
February	50 60
.....	22 55
.....	65 81
Allowance for muck-hole—1,464 yds. at 22c....	324 08

Exceptions.	[98 S. C.]
Allowance for muck-hole—extra.....	\$ 150 00
January commissary sales.....	7 45
Freight paid on engine, Chas. to Augusta.....	42 30
	<hr/>
	\$28,690 63
Paid Twiggs by William & Co.—Twiggs' testimony, p. 127.....	28,140 22
	<hr/>
Balance due by Williams & Co. to Twiggs & Son	\$ 550 41

I adopt Twiggs' statement of the total credits Williams is entitled to for the reason that it seems to have been practically accepted as correct, and is practically checked by my own calculations from Williams' statement rendered.

I find therefore that the notes given by Twiggs & Son to Williams & Co. and secured by mortgage of one Bucyrus steam shovel, as set out in the pleadings, have been more than paid by the amounts due the plaintiffs, Twiggs & Son, under the contract.

I therefore respectfully recommend:

That the temporary restraining order herein be made permanent, and the plaintiffs' bond discharged.

That plaintiffs have judgment against the defendants, W. Z. Williams & Co.

First. For the sum of five hundred and fifty and 41-100 (\$550.41) dollars, and the costs of this action.

Second. For the delivery by the defendants, W. Z. Williams & Co., to the said plaintiffs of the notes and mortgage in evidence herein, duly satisfied, for cancellation.

Respectfully submitted,

December 14, 1912.

F. K. MYERS, Master.

The defendants' exceptions to the Circuit decree were as follows:

1. We submit the Circuit Judge erred in overruling the report of the master, which found as follows:

"I find that Twiggs & Son were experienced railroad contractors, and knew, or should have known, in at least a general way the usual terms of a contract of this nature—supervision by the railroad engineer, methods of computation and manner of settlement. Having agreed to sign with Williams & Co. the same kind of contract as Williams & Co. had with the Atlantic Coast Line, they began the work with that distinct understanding and were bound by all of its terms except as to price and scopes of the work to be done by them, and cannot now invoke the previous conversation relating to the work save to the extent that the same may explain any ambiguity growing out of the changes in the wording of the contract made necessary by the limit of the work awarded them."

In overruling this portion of the report his Honor says:

"It is true that the general rule is undoubtedly that where there is a written contract (such as contained in the letters of May 17th and 20th) parol evidence is excluded, but there are exceptions, and I am of opinion that this case falls within (the exceptions as laid down in) the decision of *Herlong v. Southern States Lumber Co.*, 77 S. E. R. 219, 93 S. C. 529, etc."

The error being:

1. That plaintiffs having entered into a written contract to sign "the same kind of a contract" as the contract between the defendants and the Atlantic Coast Line Railroad Company, the plaintiffs are bound by the terms of such contract and cannot now invoke previous conversations to alter, modify or add to their agreement. All previous oral agreements and conversations are merged into the written contract. Plaintiffs were bound by their written contract; that is, they were bound by the terms "of the same kind of a contract" as existed between defendants and the railroad company.

2. The *Herlong* case is only the well-recognized principle of a partly written, partly oral contract, which requires

parol testimony to show what is the contract. The case at bar is quite different. Here the previous conversations leading up to the correspondence culminated and were crystallized in the contract made by the correspondence. In the case at bar the parties were careful to "confirm" their understanding of all previous conversations by reducing them to a written offer and a written acceptance—a written contract. Parol testimony as to previous conversations is, we submit, inadmissible in such a case.

3. We submit that the only matter open for testimony was embraced in that part of the agreement which states "you will sign the same kind of contract with us as we have with the Atlantic Coast Line." The only admissible testimony was testimony tending to show the kind of contract the Coast Line had with defendants. That contract was undisputed and was in writing. Parol testimony of conversation between plaintiffs and defendants is inadmissible to show the terms of such written contract which was the only "kind of contract" between the parties. The terms and stipulations of the Coast Line contract were binding upon Twiggs & Son, so far as they were applicable to their subcontract, and could not be varied by parol testimony of loose antecedent conversations.

2. It was error to overrule the master's report and hold that Twiggs & Son were not bound by the terms of their written contract because they either omitted, neglected or refused to sign the kind of contract they had agreed in writing to sign and to hold that "such written contract cannot be binding until signed." We submit that:

1. The Courts have decided time and again and many years ago that when parties to a contract have agreed upon the terms, although the contract calls for a mere formal contract to be signed between the parties, the contract itself is completed and the terms to be embodied in the formal instrument become a part of the original contract whether signed or not.

2. We submit the signature of Twiggs & Son to Exhibit "C" was not necessary to bind them to its terms and conditions because their signature to an acceptance of the original contract already bound them to such terms. By comparison it will be seen that Exhibit "C" is an exactly similar contract, and Twiggs & Son are, therefore, bound by its terms by virtue of their agreement to sign a similar contract to the Coast Line contract. In law they are so bound, and it is quite immaterial whether they accepted, refused or neglected to sign Exhibit "C."

3. If parol testimony were admissible to prove the conversations prior to the contract, then we submit the Circuit Judge erred in not accepting the clear and accurate account of such conversations as established by the testimony of Mr. W. Z. Williams and the equally clear and concise statement of Mr. W. A. Young as the correct account of such conversations. Their account of the oral understanding is corroborated and confirmed by the actual contract subsequently made by the correspondence and establishes the contract as claimed by defendants by at least the greater weight of the evidence.

4. We submit the Circuit Judge erred in holding as follows:

"I cannot hold that the terms of the contract submitted for signature had in all respects been definitely understood and agreed upon," for the reasons:

1. The terms of the contract were in writing and the definite understanding and agreement of the parties must be derived from those terms alone. The meaning, the understanding, the construction of a written contract is to be determined by the Court and not by the parol testimony of the parties as to their understanding of it.

2. The simple question was whether the contract submitted for signature was the same kind of a contract as the Coast Line contract. If it was (and it certainly was), then

the parties were bound by its terms, and their understanding is in law expressed by those terms alone.

5. It is submitted the Circuit Judge erred in overruling the master and holding:

"The terms of the contract, as stated in the letters, does not agree with the contract submitted for signature, for the offer of May 17th makes the compensation for tracklaying and surfacing without ballast \$450 per mile, while the contract submitted contained the requirement that contractor should furnish at his own expense the surfacing material, etc," because:

1. A contract for tracklaying and surfacing at \$450 per mile is identical with a contract containing the requirement that contractor shall furnish at his own expense the surfacing material. Both require the contractor to furnish the surfacing material. The master says upon this point: "Williams' letter of May 17, 1910, does not say in so many words that the contractor was to furnish surfacing material. * * * Both contracts, however, provided that surfacing material was to be furnished, delivered and put in place by the contractor at his own expense, and I find further from the testimony that tracklaying and surfacing cannot be made complete without the necessary material. Track laid and surfaced must be at true line and level and thoroughly tamped, and this I find to mean placing and packing of the dirt under the end and between the crossties. We submit, therefore, that the master was right and the Circuit Judge wrong, both on law and fact, in allowing Twiggs & Son credit for 10,395 cubic yards of surfacing material at 22 cents per cubic yard. The Circuit Judge has by this holding given to Twiggs & Son \$2,837.31 of the money of Williams & Co. He has given them this for furnishing surfacing material which they agreed in writing to furnish and for which they were already paid at the rate of \$450 per mile "for tracklaying and surfacing."

REP.]

April Term, 1914.

6. The Circuit Judge erred in holding that plaintiffs were entitled to compensation for excavation made without the limits of the slope stakes, because:

1. By such conclusion he has made an erroneous construction of the contract of the parties and has disregarded the uncontradicted testimony of expert witnesses and engineers as to the meaning of technical terms in the contract.

2. It was clearly erroneous to hold that the absence of the words "roadbed measurement" indicated that plaintiffs were to be paid for work, or excavation such as the borrow pit, done outside of the limits of the slope stakes as set by the engineers of the railroad company, for the following reasons:

Defendants as railroad contractors had contracted for certain work of the Atlantic Coast Line Railroad Company, which work included a portion of the double track work of that company and the construction of what is known as Bennett Yards. The plaintiffs were also railroad contractors and familiar with this class of work and with the terms of these kind of contracts, and with this knowledge sublet the Bennett Yards portion of the work. In fixing the amount of their compensation in the contract between defendants and the railroad company, the Coast Line contract provides that defendants were to be paid 18 1-2 cents per cubic yard "roadbed measurement." It is established by the testimony, admitted by both sides, that the words "roadbed measurement" mean payment for all quantities, whether an embankment or excavation. It is what is known as "a two-way contract." In fixing the amount of compensation in the subcontract between plaintiffs and defendants the contract provides for a "one-way payment;" that is, plaintiffs were to be paid 22 cents per cubic yard either for excavation or embankment, whichever was the largest quantity, but not for both. In other respects, the contracts were to be the same; it was the same work to be done under the same kind of a contract. As the contract and subcontract

related to and covered the same work and were by agreement to be similar, except as to the method of payment, it is obvious that the words "roadbed measurement" could not be used in the subcontract, because those words require "both ways," as above stated.

3. There is no dispute that within the slope stakes embankment was the largest quantity, and was, therefore, the quantity governing plaintiffs' compensation under the one-way payment agreed upon. The very existence of a borrow pit shows this, because if excavations were the largest quantity, it would be unnecessary to go outside of the slope stakes and "borrow" earth to make the embankment. It is submitted that plaintiffs' contention that excavation is the largest quantity by including the contents of the borrow pit cannot be sustained because the work they bid upon and the contract they made was for excavation or embankment, "whichever was the largest quantity," cut or fill, under the railroad contract which they had undertaken.

4. Plaintiffs' own testimony and admissions show that he accepted the work with this understanding; that he was told at the inception of the work that the engineer's estimate was embankment, 65,000 cubic yards; excavation, 45,000 cubic yards.

5. The testimony shows, and the master found, that Twiggs & Son were experienced railroad contractors and knew, or should have known, the usual terms of a contract of the nature of the contract sued on; that is, supervision by the railroad engineer, methods of computation and manner of settlement. Twiggs & Son being bound by the terms of the same kind of a contract as the contract between Williams & Co. and the Coast Line, it was error to hold that Twiggs & Son were entitled to quantities outside of the slope stakes.

6. Because the testimony shows, and the fact is, that all experienced railroad contractors know that the quantities to be paid for are the roadbed measurement quantities; that

is, quantities within the limits of the slope stakes, and this is true both as to subcontractors and contractors.

7. Because Twiggs & Son were bound by "the same kind of contract" as the Coast Line contract, and as the Coast Line contract restricted the contractors to roadbed measurement, which measurement confines the quantities to the slope stakes, the contract of the subcontractors of the same kind must necessarily be restricted within the slope stakes.

8. The testimony shows that the only proper construction of the contract confines the quantities to the roadbed.

9. Because in the absence of express agreement to the contrary railroad work confines both contractor and subcontractor to quantities within the roadbed or slope stakes, and there is no such express agreement in this case.

10. It is error, we submit, and palpably inconsistent to recognize that plaintiffs are bound by "the same kind of contract" as that of the contractors and then allow the subcontractors for excavation outside of the roadbed, which is a wholly different contract.

11. It was error to base a finding upon the absence of words which could not have been used.

7. The Circuit Judge states that there are "no words of limitation, either in the letter or that part of the submitted contract, providing for payment, limiting it to roadbed measurement or between the limits of the slope stakes." We submit this is incorrect and erroneous, because:

1. The letter of May 17th distinctly states: "For grading. 22 cents per cubic yard one way." The evidence is that these words themselves limit the work to the slope stakes. The grading could not extend beyond the slope stakes—and the words "one way" themselves confine the work to the roadbed.

2. Again the submitted contract (Exhibit "C") does expressly limit the work to the slope stakes, and by reference thereto the Court will see that under the head of excavation and embankment that the work is so limited. This

error is so plain it is evident the Court must have overlooked these terms of the contract.

3. The Circuit Judge bases his ruling upon the supposed absence of words of limitation in the submitted contract. Yet the Circuit Judge also rests his decision upon the ground that "the terms of the contract, as stated in the letters, does not agree with the contract submitted." This, we submit, renders the decision below wholly inconsistent and illogical. If the submitted contract was not the contract of the parties, then the presence or absence of words therein cannot be a basis for decision. We have shown, however, that the submitted contract does contain words of limitation. On the other hand, if the wording of the submitted contract should control, it can only be because it is the contract of the parties. We submit it is the contract and that it does limit the work to the slope stakes.

8. The Circuit Judge erred in overruling the report of the master in allowing the plaintiffs compensation for surfacing material, because:

1. The price for tracklaying and surfacing necessarily by its very terms, under the testimony, includes the surfacing material to be placed upon the tracks and roadbed, and it was error to construe the contract otherwise.

2. Because both the Coast Line contract and Exhibit "C," which is the "same kind of a contract," provide as follows:

"And it is distinctly understood and agreed that all material for surfacing must be provided, hauled and put in place by the contractor, and that the price for tracklaying and surfacing is to include the providing, delivery and putting in place of all such surfacing material as is required by the specifications."

We, therefore, submit that the correspondence constituting the contract embodied the terms of the Coast Line contract as a part of the contract, and by those terms the plaintiffs were bound to furnish surfacing material.

3. Because in overruling the report of the master and allowing plaintiffs compensation for surfacing material, the Circuit Judge has compensated the plaintiff twice for the same work. Plaintiffs agreed to do the tracklaying and surfacing for \$450 per mile, which compensation they have admittedly received. Yet the Court now awards them \$2,837.31 for that for which they have already been paid.

9. The Circuit Judge, erred in holding as follows:

"I can see no reason for reversing the account stated by the master except as to the disallowance of the 10,395 cubic yards of surfacing."

1. Because by the terms of the contract of the parties they were bound by the terms of the Coast Line contract, under which no work outside of the limits of the slope stakes was to be allowed for.

2. One of the terms of the contract, by which Twiggs & Son were bound, expressly provides that the decision of the railroad engineer as to quantities or other matters in dispute shall be final. Mr. Nichols, the engineer, testified that embankment was the largest quantity, and that the quantities were as follows: Excavation, 55,336; embankment, 71,176. He says he made these measurements and they are correct. We submit that plaintiffs are in law bound by his measurements, calculations and statements, and the master so held, although he himself disregarded them.

3. The master finds that the contract provided that the Nichols figures were to be accepted as final, and the Circuit Judge "sees no reason for reversing the account as stated by the master," yet the master and the Circuit Judge in their calculations have repudiated the figures of the impartial engineer and accepted the figures of J. D. Twiggs. The basis of this erroneous calculation commences with the acceptance of the statement of J. D. Twiggs that the total excavation was 106,019 cubic yards.

4. No fraud, collusion, or incompetency is charged in the case, and we submit as matter of law that the figures of Nichols are final and conclusive.

5. The Circuit Judge says that the calculations of the engineer as to work within the slope stakes was accepted by Twiggs as correct. Yet the Circuit Judge affirms the erroneous calculations of the master. He erroneously takes the statement of J. D. Twiggs that the total excavation was 106,019 cubic yards. Now, Nichols, the engineer, testified that the excavation within the slope stakes was 55,336 cubic yards. Mr. Twiggs testified his measurement of the borrow pit was 36,463 cubic yards. Deducting 36,463, his borrow pit measurement, from his 106,019 should, therefore, give Twiggs' figures as to the excavation within the slope stakes. This, however, would make Twiggs' figures within the slope stakes 69,556 yards, which is not correct, if he accepted, as the Circuit Judge says he did, Nichols' figures of 55,336 as the correct excavation within the slope stakes. It is a difference of 14,220 yards. We submit it is manifest that the figures of the engineer, even for work within the slope stakes, accepted as correct, have been repudiated in this calculation.

6. The master states in his findings that Nichols figures the proper allowance for excavation, including the borrow pit, and exclusive of the muck-hole, 86,039 yards. This seems to be arrived at as follows: Nichols says that the total excavation, including the muck-hole and borrow pit, amounts to 87,663 yards, and that the muck-hole amounted to 1,624 yards, which, deducted from 87,663, would leave 86,039 yards. Nichols' figures are as follows: Excavation in yard above subgrade, 47,221; excavation in yard below subgrade, 3,667; borrow pit above subgrade 26,971; borrow pit below subgrade, 2,897; total excavation in muck-hole, 1,624; total excavation in ditches, 3,682; total excavation for Ashley River change of line, 1,601—87,663.

REP.]

April Term, 1914.

According to the master, Mr. Nichols testifies that the correct total excavation, excluding the muck-hole and including the borrow pit, is 86,039 yards. Now, deducting from this the surfacing material of 14.85 miles at 700 yards to the mile, which amounts to 10,395 yards, would leave a balance of 75,644 yards, and from this balance deduct the 4,000 yards wasted would leave the correct yardage for settlement 71,644. The final estimate showed total embankment 71,176, which corresponds with Nichols' testimony. Nichols arrives at 71,176 yards of embankment as follows: Includes all embankment within the slope stakes on the yard, includes also change of line in Ashley River extension, 1,434; cutting below grade in muck-hole, 1,624; excess material on north yard, being a total of 71,176. Adding to the 71,644 yards as above, 3,298 yards, which is one-half the difference between Nichols' and Twiggs' calculations of the borrow pit, makes 74,942 yards, which at 22 cents would amount to \$16,487.24 instead of \$19,432.72, making a difference in this item alone of \$2,944.48. Leaving all other items of the master as correct, this would leave a balance in favor of Williams & Co. of \$2,394.07.

10. It was, we submit, error to hold that the letter of February 15, 1911, from Twiggs & Son to Williams & Co., admitting the correctness of the statement of account then rendered by Williams & Co., did not constitute an account stated and a bar to plaintiffs now attempting to recover other matters covered by the period of said account. It was, we submit, a solemn admission, which cannot now be disputed.

11. The facts of this case show that plaintiffs, as subcontractors, being unable to perform their work or pay for their labor, applied to defendants for assistance, and defendants, at their request, lent them money for carrying on the work, taking as security a mortgage of a steam shovel. On the 1st of January, 1911, Twiggs & Son, having broken their contract and being unable to complete the work, turned it over to Williams & Co. for completion. Williams & Co. com-

pleted the work and demanded a payment of their debt secured by said mortgage, which now amounts to \$3,363.65 with interest thereon at 8 per cent. Payment having been refused, proceedings to foreclose were commenced. Instead of collecting their just debt of \$3,365.65, this debt has been cancelled and an additional debt of \$3,329 imposed, a total loss of \$6,692.65. This is said to be the decree of a Court of equity. Plaintiffs in this injunction suit with the burden of proof resting upon them rested their case upon their statements alone. Defendants established their case by their own testimony and corroborated it by numbers of disinterested witnesses. We, therefore, submit that the Court below erred in its findings of fact against defendants and contend that the clear weight of the testimony sustains our position, and submit that on the law and the facts the judgment below must be reversed, the injunction be dissolved, and a judgment in favor of defendants for the amount of their mortgage debt, \$3,363.65 and interest, be rendered.

Messrs. W. Huger Fitzsimons and Thomas W. Davis, for appellant, submit: No parol testimony of previous conversations was admissible to show the terms of the contract: 77 S. C. 191; 62 S. C. 414. Acceptance of terms offered in letter constituted the contract: 93 Fed. 367; 42 U. C. Q. B. 115; 36 Ib. 46; 144 N. Y. 209; 3 Tex. App. Civ. Cases, 267; L. R. 5 Q. B. 346; Clark Contracts 38; 2 Parsons Contracts 285, 286. So much of the contract between Williams and the railroad as is applicable to the Bennett Yard work is a part and parcel of the contract between Williams and Twiggs, although not signed: Clark Contracts 38; 2 Wharton Contracts, sec. 645; 2 Parsons Contracts, pp. 285, 286; 9 Cyc. 282; 3 App. Cases, 1124; 23 L. R. A. 707; 29 Ga. 158; 8 Ch. Div. 70; 144 N. Y. 209; 9 Ves. 351; 11 N. Y. 441; 6 H. of L. 238; 64 N. C. 743; 21 N. Y. 305. All agreements and conversations prior to the letters of Williams of May 17th were merged into the written contract as

REP.]

April Term, 1914.

contained in the letters of May 17th and 20th: 17 Cyc. 567; 46 S. C. 372; 24 S. E. 294; 34 S. C. 330; 13 S. E. 525; 19 S. C. 121; 77 S. C. 191; 57 S. E. 766; 82 S. C. 441; 72 S. E. 74; 125 Fed. 110; 24 S. E. 646; 23 S. E. 611; 23 S. E. 772; 17 S. E. 882; 16 S. E. 220; 45 S. E. 711; 96 U. S. 544. *Custom as to measurements in estimating work done:* 24 Vt. 660. *Subcontractor bound by terms of contract with railroad company:* 33 Cyc. 341; 16 Pa. St. 469; 55 Am. Dec. 519. *Certificates of railroad engineer final and binding on both parties in absence of fraud or gross mistake:* Wait on Engineering and Architectural Jurisprudence, sec. 445; 33 Cyc. 333, *et seq.*; 116 N. Y. 19; 15 Am. St. Rep. 376; 34 Am. St. Rep. 403; 51 Ga. 348; 138 U. S. 185; 58 N. E. 335; 38 Fed. 304; 112 N. Y. 30; 27 Vt. 673, 679; 55 Am. Dec. 519; 20 N. Y. 463; 11 Gratt. 676; 50 N. Y. 228; 69 Tex. 691; 95 Tenn. 543; 114 U. S. 549; 109 U. S. 618; 138 U. S. 165; 97 U. S. 402; 10 Ill. 521. *In order to prove fraud or mistake on the part of the engineer it must be alleged:* 9 Enc. Pl. & Pr. 684; Wait, sec. 427; Kerr on Fraud and Mistake, pp. 365, 366, 407. *Account stated between parties:* 57 Miss. 51; 4 N. W. 411; 6 Me. 307; 23 Pa. 961. *Could only be impeached for mistake:* 49 N. Y. Supp. 154; 60 N. Y. Supp. 668; 15 Pac. 371; 2 Greenleaf Ev., sec. 126; 1 Cyc. 364; 54 Am. St. Rep. 93; 12 Pet. 300.

Messrs. Nathans & Sinkler, for respondent, cite: As to admission of parol testimony to supplement written contract: 93 S. C. 529. *Finding of fact:* 79 S. E. 90; 91 S. E. 476; 92 S. C. 601.

August 26, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

The printed "Case" contains between six and seven hundred pages. It was admitted, at the hearing, that not more than one-third of the matter contained therein is per-

tinent to the questions presented for decision. Examination shows that, if it had been prepared according to the rules, it could probably have been reduced to from one to two hundred pages. The Court would, therefore, be warranted in dismissing the appeal, without consideration of the merits, because of the violation of its rules. In numerous cases, the bar have recently been admonished about this matter. If these admonitions continue to go unheeded, the Court will be compelled to protect itself by dismissing the appeal, when the "Case" is not prepared according to its rules.

In preparing the "Case," instruments of writing, such as the pleadings, wills, deeds, notes, bonds, mortgages, bills of lading, policies of insurance and the like should not be set out in full, unless the instrument is to be construed;

1 and, even then, only so much of it as is necessary to a proper construction should appear. Ordinarily, it is sufficient to state the substance of such instruments; but, if special consideration of any part is desired, such part should be set out in full, and the substance of the remainder stated. If it should happen, as it sometimes does, that the different parts of an instrument are so dependent upon other, or otherwise so correlated that the whole is necessary to a proper understanding or construction of any part, then the whole instrument should appear. But we often find in the "Case" the whole of a bill of lading or policy of insurance, when only one clause or stipulation is to be considered or construed. Deeds and mortgages are often set out at length, including the probate thereof and renunciation of dower, when the part necessary for consideration could be stated or set out in half a dozen lines. This is not only an unnecessary tax upon the time and patience of the Court, but it is a useless waste of the money of litigants.

Whenever it is necessary to present the testimony to this Court, it should be stated in narrative form, and only the substance of it given, without repetition, omitting all that is

REP.]

April Term, 1914.

irrelevant to the issues to be decided. When the questions and answers are necessary to elucidate the point to be decided, or it is desired to call attention to the exact language of a witness, the same may properly be inserted.

It may be suggested that it is often difficult for counsel to agree as to what is a correct synopsis of the evidence. In such cases, let the Circuit Judge decide between them. If he rules erroneously, his ruling is subject to appeal, to be heard in connection with the principal appeal; and this Court will decide the matter, and impose the payment of costs and disbursements accordingly, for counsel have the right, and it is their duty, to protect their clients against the possibility of having to pay for unnecessary printing as disbursements.

The bar is again warned that the rules of this Court must be complied with in the preparation of the "Cases" for appeal, and that, in future, the Court will feel at liberty to decline to consider any appeal in which the "Case" is not prepared according to the rules.

The facts are clearly stated in the master's report. As will be seen by reference to that report, the master held that the contract between the parties was in writing, and that it consisted of the letters of May 17th and 20th, and so much of the contract between Williams & Co. and the railroad company as was applicable to the work undertaken by Twiggs & Son, except as to prices and scope of work to be done by them.

The Circuit Court overruled this conclusion, and held, under the authority of *Herlong v. Southern States Lumber Co.*, 93 S. C. 529, 77 S. E. 219, that the contract

2 was partly written and partly verbal, the verbal part consisting of the conversation referred in Williams & Co.'s letter of the 17th to Twiggs & Sons.

His Honor misconstrued the opinion of the Court in the Herlong case. In that case, the language of the letter which was construed to make a previous conversation a part of the

contract was as follows: "The administration of the company's affairs to be along the lines which I talked of with you, when at Dunbarton, on Saturday." The Court said: "The talk at Dunbarton was adopted as a part of the contract, and, of course, could be proved only by parol." But, in this case, the letter of May 17th does not refer to the previous conversation as a part of the contract, but the reference to them was for the purpose of confirming and making only so much of them as was included in the letter a part of the contract. The part not included therein was not confirmed, and was, therefore, not a part of the contract. Plaintiffs' letter of the 20th, in reply shows clearly that they so understood the defendants' letter of the 17th, for they said, "yours of the 17th, *covering agreements made,*" etc. If defendants' letter of the 17th had not *covered* all the agreements made, surely plaintiffs would not have said that they did.

Twiggs & Son agreed that they would sign the same kind of contract with Williams & Co. as the latter had with the railroad company. In the absence of fraud, accident or

mistake, they should not now be heard to say that
3 they are not bound by that agreement, because they did not know or understand the terms of the contract between Williams & Co. and the railroad company. It was their duty to ascertain what its terms were before agreeing to sign it. Of course, if Williams & Co. misrepresented its terms, Twiggs & Son would be bound by it only in so far as its terms were what they were represented to be. But there is no evidence of any such misrepresentation, except in reference to the matter of unloading track material, which was waived by Twiggs & Son, and is of no consequence as to the issues now before the Court.

Reason and authority abundantly support the proposition that one contract may be made a part of another by reference to it. In *Dunbar v. Ry.*, 62 S. C. 414, 40 S. E. 884, it was held that "where a shipper accepts for freight delivered

to a common carrier a receipt containing the provision that this shipment is received subject to the terms and conditions of the carrier's regular bill of lading, for which this receipt may be exchanged, he has such notice as will put him on inquiry of the terms and conditions of the bill of lading, and is bound by such terms and conditions." The master's conclusion was correct.

The next question is: Did the master and Circuit Judge err in holding that, as there were no words in the contract limiting Twiggs & Son to payment for excavation within the limits of the roadbed, they should be paid for
4 excavation outside those limits? On this point, the testimony of the expert witnesses as to the meaning of the words of the contract is conflicting, and, while we have been impressed by the able and zealous argument of appellants' counsel, we cannot say that the preponderance of the evidence is against this concurrent finding of the master and Circuit Judge,—especially in view of the following provision in the contract submitted by Williams & Co. to Twiggs & Son for execution: "Grading will include all excavations and embankments, and will be paid for 'one way' only, either for excavation or embankment, according to the largest quantity." The words of the proposed contract are "all excavations," etc. While the words "roadbed measurement" were not appropriate to the contract between plaintiffs and defendants, there is no reason why other words which would have limited payment to quantities within the slope stakes could not have been used.

It follows from what has already been said as to what the contract was, that the Circuit Court erred in overruling the conclusions of the master that plaintiffs were not entitled to pay for surfacing material. The contract of defendants with the railroad company, by the terms of which plaintiffs were bound, expressly provides "that the price for track-laying and surfacing is to include the providing, delivery,

and putting in place all such surfacing material as is required by the specifications."

The other points raised by the exceptions are overruled for the reasons stated by the master, which were concurred in by the Circuit Court.

The judgment of the Circuit Court is modified according to the view herein announced.

8925

CRAWFORD v. MASTERS.

(82 S. E. 978.)

LIMITATION OF ESTATES. STATUTES. RIGHTS OF SUCCESSION.

The Act of 1906, vol. I, Code of Laws 1912, sec. 8562, making an illegitimate child the heir of its mother, rendered the giving birth at a prior date to an illegitimate child, who was still living in 1914 when the mother, a tenant in fee conditional, made and tendered her deed to her vendee, a good performance of the condition on which the mother held title, and enables her to convey the land in fee simple to her vendee.

Before PRINCE, J., Anderson, May, 1914. Affirmed.

Action by Lula P. Crawford against John N. Masters for specific performance of contract for sale of land. From a decree in favor of plaintiff, the defendant appeals on the following exceptions:

1st. Because his Honor, the Circuit Judge, erred in holding that the plaintiff was entitled to a decree of specific performance, when he should have held that the plaintiff did not have such a title that she could convey the land in fee simple.

2d. Because his Honor, the Circuit Judge, erred in holding that the birth of illegitimate issue and the passage by the legislature of the act of 1906 (section 3562, Civil Code

REP.]

April Term, 1914.

1912), subsequent to the execution of the deed from H. K. Crawford to Lula Crawford, was such a performance of the condition of said deed as enabled the said Lula P. Crawford to convey the land in fee simple and thereby bar the rights of the issue and cut off the reverter of the grantor.

3d. Because his Honor, the Circuit Judge, erred in holding that the legislature had the right by the act of 1906 (section 3562, Civil Code 1912), to change or divest the right of reverter of the grantor, H. K. Crawford, when he should have held that the said act of the legislature, having been passed since the execution of the deed by H. K. Crawford to Lula P. Crawford, to construe the said act as applying to this case would impair the obligation of a contract, to wit: the said deed from the said H. K. Crawford to Lula P. Crawford.

4th. Because his Honor, the Circuit Judge, erred in refusing to hold that the legislature had no power under the Constitution to divest or change the right of reverter of the grantor, H. K. Crawford, under the deed executed by him to Lula P. Crawford.

5th. Because his Honor, the Circuit Judge, erred in refusing to hold that the act of 1906 (section 3562, Civil Code 1912), has no application to this case because: (a) The act does not apply unless the mother dies intestate. (b) The act does not apply to fee conditionals. (c) If the illegitimate child, Lucile Crawford, should die before her mother, Lula P. Crawford, the act could not apply, and, therefore, the condition of the deed would not be performed.

The facts are stated in the opinion.

Mr. A. H. Dagnall, for appellant, submits: *Statute conferring rights on illegitimate children should be strictly construed: 78 Miss. 209; 84 Am. St. Rep. 624; 183 Ill. 486; 75 Am. St. Rep. 124. To construe it as affecting contracts made before its passage would impair the obligation of the*

contract, and divest vested rights: 96 U. S. 595; 24 L. Ed. 793; 6 Cr. 87; 3 L. Ed. 162; 11 Am. Dec. 90.

Messrs. Quattlebaum & Cochran, for respondent, cite:
As to nature of fees conditional: Harp. L. 92; 5 Rich. Eq. 441; 17 S. C. 545; 28 S. C. 238; 47 S. C. 294; 90 S. C. 474; 91 S. C. 487; 1 Hill Ch. 276; 53 S. C. 197; Bailey Eq. 226.
Right of reverter a mere possibility, and not property: 81 S. C. 284, 285; 31 S. C. 13, 37; 1 Hill Ch. 235; 2 Hill Ch. 244.
The law defines heirs: 76 Pa. St. 81; 18 Am. Rep. 428.
Interest cannot pass by devise: Harp. L. 92; 5 Rich. Eq. 441.
Performance of condition: 91 S. C. 494.
Statute to be construed according to legislative intent: 134 U. S. 624; 33 L. Ed. 1083.
Intent to ameliorate the harsh rule of the common law against illegitimates: 2 Kent Com. 209; 84 Ala. 284; 4 So. 675.

August 27, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

In 1889, H. K. Crawford conveyed a tract of land to his daughter, Lula P. Crawford, *habendum* "unto the said Miss Lula J. Crawford and to her bodily heirs and assigns forever and to no others." In 1906, the legislature enacted (Civil Code 1912, sec. 3562) that "any illegitimate child or children, whose mother shall die intestate, possessed of any real or personal property, shall be, so far as said property is concerned, an heir or heirs at law as to such property, notwithstanding any law or usage to the contrary." In 1899, Lula P. Crawford gave birth to an illegitimate child, Lucile Crawford, who is still living. In 1914, plaintiff contracted with defendant to sell him the land and make him good title thereto in fee simple. Defendant refused to accept her title and comply with his contract, on the ground that she could not make a good title, and this action was brought to determine whether, under the statute above quoted, the birth of

REP.]

April Term, 1914.

an illegitimate child enabled her to make a fee simple title to the land.

Plaintiff's title is a fee conditional. At common law, the tenant in fee conditional may, on the birth of lawful issue, convey the land in fee simple. *Jones v. Postell*, 16 S. C. L. (Harp. L.) 92; *Wright v. Herron*, 26 S. C. Eq. (5 Rich. Eq.) 441; *Burnett v. Burnett*, 17 S. C. 545; *Archer v. Ellison*, 28 S. C. 238, 5 S. E. 517; *Miller v. Graham*, 47 S. C. 294, 25 S. E. 165; *Timber Co. v. Holden*, 90 S. C. 474, 73 S. E. 470; *Holley v. Still*, 91 S. C. 487, 74 S. E. 1065. If the statute makes plaintiff's child her heir, so that the child would take the land under the deed on the death of her mother, the condition of the deed has been performed, and plaintiff can make a fee simple title to the land. By its terms, the statute makes an illegitimate whose mother shall die intestate, possessed of any property, an heir at law as to such property. As to this property, the mother is bound to die intestate, for it is not subject to devise. *Jones v. Postell*, 16 S. C. L. (Harp. L.) 92; *Wright v. Herron*, 26 S. C. Eq. (5 Rich. Eq.) 441. Therefore, if plaintiff should die now, Lucile would take as her heir under the statute. That being so, the title tendered to defendant is good.

The statute was intended to ameliorate the rigorous policy of the common law with respect to the rights of bastards, which, in modern times, has been thought to visit the sins of the fathers too harshly upon their innocent offspring. It is therefore remedial in its nature, and should be construed liberally.

There is no force in the contention that this construction makes the statute retroactive. Nor is it obnoxious to any settled principle of law, in that it gives an effect to the deed of H. K. Crawford, different from that which it would have had, if the statute had not been enacted. While it is true that the laws existing at the time and place of making contracts enter into and form part of them, so that it will be presumed that the parties contracted with reference to them,

it is also true that contracts are made in contemplation of the fact that the policy of the State relative to any matter is subject to change, and that parties to contracts have no vested right in an existing policy.

The principle is illustrated and the point decided in the case of *Deas v. Horry*, 11 S. C. Eq. (2 Hill Ch.) 244. There a fee conditional was created by devise prior to the act abolishing the right of primogeniture. A reverter occurred, for failure of issue, after the passage of the act. It was, nevertheless, held that the reversion went, not to the eldest son of testator, as would have been the case under the law existing at the date of the creation of the estate, but to his heirs general, according to the law as it existed at date of the reverter. The Court said: "It was argued that on the death of Elias Horry, the right of reverter descended on his son, Elias Lynch Horry, and it seemed to be thought that this right could not be divested by the act of legislature. But why not? It belongs to the legislature to direct the course of descent, and declare who shall be heir. It is true that the right of reverter descended on Elias Lynch Horry in this sense, that if the fee conditional had determined at any time after the death of his father, and before the act of 1791, he would have been the person then entitled to the benefit of it. But that right he could not have transmitted to his heirs, if the act of 1791 had never been passed. Such a right, according to the views before expressed, is not regarded as property, it is a mere possibility, analogous in some degree to an heir apparent's right of succession."

In *McGunnigle v. McKee*, 77 Penn. St. 81, 18 Am. Rep. 428, the Court gave a statute legitimating a bastard the same construction and effect that has been given the statute in this case. Testator gave lands to "my son T. and his heirs, provided that, if my son T. should die without an heir," then the lands were to be divided between another son and his children. After testator's death, an illegitimate daughter of T. was, by act of the legislature, made his law-

REP.]

April Term, 1914.

ful heir. T. died leaving no other child. *Held*, that the legitimated bastard took under the will as heir of T. The Court said: "It is urged, however, that this is not the kind of child or heir that James McKee had in his mind at the time he executed his will. That he intended one born in lawful wedlock. We answer, he did not so declare in his will. He used the technical word 'heir.' He did not attempt to indicate what facts in his opinion constituted an heir. He made his will under the law, and left it to the law to determine whether Thomas died without an heir. He must be presumed to have known the legislative power to declare who should be an heir. He, therefore, intended to subject the property devised to legislative discretion to enact, within constitutional limits, whether Thomas had issue capable of inheriting. The law of every country regulates the succession of estates on the death of its citizens."

Judgment affirmed.

8926

KIRVEN v. WILDS ET AL.

(82 S. E. 678.)

MORTGAGES. FORECLOSURE. SUBSEQUENT VENDEES. SPECIFIC PERFORMANCE.

1. A mortgagee may refuse to either release a portion of the mortgaged land on payment of a portion of the debt, or to assign the mortgage to a third party paying the entire amount due.
2. In an action to foreclose two mortgages on lands, one given prior, and the other subsequent, to a contract by mortgagor for sale of a portion of the lands, which was duly recorded, the rights of the vendees to specific performance by their vendor should be protected in the decree for foreclosure of the prior mortgage, and are superior to the lien of the subsequent mortgage.

Before F. B. GARY, J., Darlington, December, 1913.
Modified.

Action by John K. Kirven against Ralph D. Wilds, Elliott Wilds, David Wilds and James Wilds, for foreclosure of

two mortgages on certain lands. From decree for foreclosure, the defendants, Elliott Wilds, David Wilds and James Wilds appeal. The facts are stated in the opinion.

Mr. George H. Edwards, for appellants.

Messrs. George E. Dargan and B. Wofford Wait, for respondent, submit: Findings of fact against appellants: 92 S. C. 113. Appellants made no unconditional tender to pay; amount due on mortgages: 88 S. C. 539; 30 Mich. 159; 92 S. C. 118. Nor has tender been kept good by payment of money into Court: 88 S. C. 533.

August 28, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

This is an action to foreclose the mortgages hereinafter mentioned. On January 3, 1903, Ralph Wilds and Robert Wilds bought of A. Nachman 80 acres of land, and gave him a mortgage thereon to secure the unpaid purchase money. Nachman assigned the mortgage to Hennig. On December 31, 1910, the defendants, Elliott Wilds, Dave Wilds and James Wilds, paid Hennig \$50 on this mortgage and agreed to pay \$425.42 on it, within twelve months, with interest at eight per cent., and, in consideration thereof, Ralph Wilds agreed, "if said amount is paid by said parties within said time," to convey to them forty acres of land, "at that half of my land on which the house is located. This is one-half of the tract conveyed to me by A. Nachman." This agreement was duly recorded. Thereafter, Hennig assigned the mortgage to plaintiff. On January 2, 1912, Ralph Wilds gave plaintiff another mortgage of his undivided interest in said land to secure the payment of \$789.

The testimony on the part of the defendant was to the effect that, in the latter part of December, 1911, Ralph Wilds went with Elliott and James to Hennig to pay the

REP.]

April Term, 1914.

amount stipulated in the agreement on the mortgage. They were informed that it had been assigned to plaintiff. They then went to plaintiff and offered to pay him the amount which they had agreed to pay, and asked him to release the lien of the mortgage on the part which Ralph had agreed to convey to them, but plaintiff refused to do so. They then proposed to plaintiff that they would get the money and pay the whole amount due on the mortgage, if he would assign it to such person as they should name, but plaintiff declined that proposition. All this was denied by the plaintiff.

Ralph Wilds admitted that his codefendants, Elliott, David and James, offered to comply with the terms of their contract with him, and that he was and is willing to comply therewith by making them a deed to the land. It is, therefore, of no consequence whether they offered to pay the plaintiff, as they testified, or not. Their failure to do so would not have worked a forfeiture of their rights in the land. Nor is it of consequence that their offers to pay plaintiff were conditional. The plaintiff was strictly within his legal rights in refusing to assign the mortgage. He was well within his legal and equitable right in refusing to release the lien of his mortgage on half the land, upon payment of the amount alleged to be due by Ralph Wilds, because it may be that the part he was asked to release is the most valuable part of the land, and his mortgage covered the whole thereof.

But the Circuit Court was in error in holding that the defendants, Elliott, David and James, had no right, under their agreement with Ralph, which the Court should protect. By virtue of that agreement, they are entitled to specific performance on the part of Ralph. Moreover, the plaintiff's mortgage of January 2, 1912, was taken after that agreement was made and recorded, and is, therefore, subject to it, that is, as to that mortgage, the defendants, Elliott, David and James, have priority in the portion of the land.

The judgment of the Circuit Court is modified, and the case is remanded for such further proceedings as may be necessary according to the rights of the parties as herein determined.

Modified.

MR. JUSTICE FRASER was disqualified in this case, and did not sit.

8927

NUNNAMAKER v. SMITH'S ET AL.

(92 S. E. 675.)

APPEAL AND ERROR. NEW TRIAL. SLANDER.

An appeal will not lie by a defendant, who has been acquitted of slander, from an order granting a new trial; since the Court could not render judgment absolute on the right of the appellant, if it should decide there was no error in granting the new trial.

Before PRINCE, J., Columbia, February, 1914. Appeal dismissed.

Action by Mary Nunnemaker, an infant, by Ida L. Nunnemaker, her guardian *ad litem*, against Smith's, a corporation, and H. K. Smith. From an order granting a new trial H. K. Smith appeals. The facts are stated in the opinion. The case had been before the Court on a former appeal; see 96 S. C. 294, where the complaint is stated.

Mr. Edward L. Craig, for appellant, submits: *Defendant, H. K. Smith, having been acquitted should be discharged*, and cites 65 S. C. 344; 75 S. C. 293; 82 S. C. 520.

Mr. D. W. Robinson, for respondent, submits: *In actions against master and servant for injuries caused solely by the*

misfeasance of servant, a verdict cannot be rendered in favor of the servant and against the master: 68 S. E. 1103; 30 L. R. A. (N. S.) 404 and notes, pp. 407, 408; 73 S. E. 1062; 200 Mo. 347; 9 L. R. A. (N. S.) 880 and note, p. 884; 218 Ill. 414; 2 L. R. A. (N. S.) 764; 142 U. S. 18; 35 L. Ed. 923, 925. *Servant personally liable:* 72 S. C. 472, 473; 2 L. R. A. (N. S.) 379 and note; 48 S. C. 324; 82 S. C. 523, 524; 131 Ky. 142; 25 L. R. A. (N. S.) 343 and note; note in 50 L. R. A. 644; 3 Thomp. Corp. 4091; 1 A. & E. Enc. of L. (2d ed.) 1134, 1135. *Cases distinguished because other acts of negligence than those of agent were involved:* 65 S. C. 344; 68 S. C. 55; 194 U. S. 141; 48 L. Ed. 910; 75 S. C. 290; 65 S. C. 338; 93 S. C. 342, and review of authorities in note in 30 L. R. A. (N. S.) 404 to 407.

August 28, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

The defendant, Smith's, is a corporation and the defendant, H. K. Smith, the president-treasurer and manager thereof, were sued jointly in this action for slander. The evidence showed that if the tort was committed, it was done by and through the agency of the defendant, H. K. Smith. The Court instructed the jury that they might find a verdict against either or both defendants. The jury found against the corporation only. On motion of plaintiff, the Court set aside the verdict and granted a new trial, on the ground that it had erred in the instruction that the verdict might be against either or both defendants, and held that the verdict acquitting the agent and finding the corporation guilty was self-contradictory. The defendant, H. K. Smith, appealed.

An order granting a new trial is not appealable, except in cases where this Court can render judgment absolute upon the right of the appellant, if it shall determine that no

error was committed in granting the new trial. This conclusion was reached in *Daughty v. Northwestern R. Co.*, 92 S. C. 361, 75 S. E. 553, after mature deliberation and a review of all the decided cases. This is not such a case; because, if the Court should decide that there was no error in granting the new trial, it could not render judgment absolute upon the right of the appellant, since he has been acquitted of the slander by the jury. If we should find no error, we could only send the case back for trial. Therefore, the order is not appealable.

Appeal dismissed.

8441; 8650

DUPRE v. COLUMBIA, N. & L. R. CO.

(79 S. E. 310.)

CARRIERS OF GOODS. INTERSTATE COMMERCE. POWERS REMAINING TO
STATE. CARMACK AMENDMENT.

The Carmack Amendment, June 29, 1906, c. 3591, sec. 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1911, p. 1307), to the Interstate Commerce Act, February 4, 1887, c. 104, sec. 20, 24 Stat. 886 (U. S. Comp. St. 1901, p. 3169), imposing a liability for damage to goods shipped upon the initial carrier, and providing that it shall not deprive the owner of any right which he had under the existing law, does not deprive a consignee of his right to a penalty for failure of the terminal carrier to pay the damages to the shipment or to inform the consignee of which carrier caused the damage, given by act February 15, 1910 (26 Stat. at Large, p. 717, Civ. Code 1912, sec. 2572), since the two statutes refer to the liability of different carriers.

Before GAGE, J., Columbia, Fall term, 1912. Affirmed.

Action by M. B. DuPre against the Columbia, Newberry & Laurens Railroad Company. Judgment for plaintiff, and defendant appeals.

REF.]

April Term, 1914.

Messrs. Lyles & Lyles, for appellant, cite: 91 S. C. 379, 381; 125 U. S. 181; 31 L. Ed. 650; 125 U. S. 465; 162 U. S. 197; 40 L. Ed. 490; 34 S. W. 145.

Messrs. Rembert & Montieth, for respondent.

March 10, 1913.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

This action was brought against the defendant, the terminal carrier of an interstate shipment, to recover the penalty provided by statute (26 Stat. 717, Civil Code 1912, sec. 2572) for failure to pay the damages to a shipment, or trace it, and inform the consignee when, where, and by which carrier it was damaged, within forty days after notice thereof. Defendant admits liability for the penalty if the statute imposing it is not in conflict with the federal statute regulating interstate commerce.

In *Meetze v. Sou. Express Co.*, 81 S. C. 379, 74 S. E. 823, it was held that, as to initial carriers of interstate commerce, the State statute was superseded by the federal statute, because the purpose of the State statute was to find out which carrier was liable, and the federal statute answers that question as to initial carriers by making them liable at all events. The same reasoning, however, does not apply when it is sought to enforce the State statute against intermediate or terminal carriers, because their liability to the owner of the goods is not affected by the federal statute. The proviso to the Carmack amendment reads: "That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." If, therefore, the owner finds it to his advantage to pursue the carrier who actually lost or damaged the goods, the same not being the initial carrier, it is as necessary now as it was at the time of the adoption of the Carmack amendment, that he have the information

which the statute requires the carriers to furnish, which they can usually and readily do. The federal statute does not cover the same field as the State statute, when applied to intermediate or terminal carriers; and, therefore, as to these there is no conflict.

It has been settled by repeated decisions of this Court and of the Supreme Court of the United States that statutes like this are within the power of the States, in the absence of federal legislation on the same subject. *Winslow v. Railroad Co.*, 79 S. C. 344, 60 S. E. 709, and cases cited; *Richmond & Co. v. Patterson Tobacco Co.*, 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759; *Atlantic C. L. R. Co. v. Mazursky*, 216 U. S. 122, 30 Sup. Ct. 378, 54 L. Ed. 11.

Affirmed.

September 20, 1913.

A petition for rehearing was filed by appellant and dismissed on the following order, delivered by the Court through MR. JUSTICE HYDRICK.

The petition for rehearing in this case is based upon the ground that, since the filing of the opinion herein, the Supreme Court of the United States has held, in the case of *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, filed January 6, 1913, that the proviso to the Carmack amendment, which saves to the holder of the bill of lading "any remedy or right of action which he has under existing law," must be construed as saving only remedies and rights which he had under existing federal law, and that therefore the proviso cannot be held to save to the holder of the bill of lading the right and remedy given him by the statute of this State, under which the defendant was penalized, for failing to furnish the consignee the information required by the statute. It is also contended that the statute is in conflict with the Carmack amendment, as the amendment was interpreted and applied by the Supreme Court in the Croninger case.

REP.]

April Term, 1914.

In the case of *Varnville Furniture Co. v. C. & W. C. R. Co.*, 98 S. C. 63, 79 S. E. 700, we attempted to show that the language of the Supreme Court in the Croninger case, properly construed, did not have the effect of limiting the proviso to the Carmack amendment to the saving of rights and remedies existing only under the federal law, but that the Court gave it the same construction which had been given a similar provision in the act of 1887 to regulate commerce in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, to wit: "That it was evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the interstate commerce act, or by State statute or common law, *not inconsistent with the rules and regulations prescribed by the provisions of this act.* (*Italics added.*)

What we said in the Varnville case is applicable in this case, because that decision is rested upon the ground that there is no federal legislation upon the subject covered by the State statute, and for the same reason we hold that the statute assailed in this case is valid. This principle upon which we decided that case is so clearly and cogently stated in *Chicago, Rock Island & Pacific Ry. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284 (decided January 6, 1913), that we quote it as there stated. After having shown that Congress has legislated concerning the deliveries of cars in interstate commerce by carriers subject to the act by imposing a specific duty to furnish them for interstate traffic upon reasonable request therefor, and by giving remedies for the violation of that duty, the Court proceeded: "As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in

the absence of legislation by Congress, it must follow, in consequence of the action of Congress to which we have referred, that the power of the State over the subject matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where, from the particular nature of certain subjects, the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power. *Southern R. Co. v. Reid*, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257."

Clearly, therefore, until Congress takes possession of the field covered by this statute, its validity remains unimpaired, and there is no conflict either as to the exercise of the power over the subject or in the regulation affecting it. The vital question, then, is: Has Congress legislated upon the same subject? Certainly the Carmack amendment does not deal with it. In the Varnville case we showed that the subject of the Carmack amendment was "the liability of the carrier under a bill of lading which he must issue." We believe the legislation of Congress will be searched in vain to find any provision which even indirectly deals with the same subject which is covered by this statute (the requiring of intermediate and terminal carriers to inform the shipper when, where, and by which carrier in the route his goods were lost or damaged), if they can furnish that information by the exercise of reasonable diligence, a duty which in no wise affects the liability under the bill of lading. In *Sea-*

REF.]

April Term, 1914.

board *Air Line R. Co. v. Seegers*, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108, and in *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 200, 31 Sup. Ct. 164, 55 L. Ed. 180, 37 L. R. A. (N. S.) 7, and in other cases, the Supreme Court has pointed out the fact and made it a ground of decision that "the business association of such carriers affords to each facilities for locating primary responsibility as between themselves which the shipper cannot have."

In *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690, decided March 10, 1913, the Court held that a stipulation in a bill of lading limiting to 90 days the time within which an action can be brought against the carrier to enforce liability for loss or damage en route is valid, and that it supersedes State laws to the contrary. The reason is therefore the greater why carriers should furnish the shipper the information required by this statute.

If the carrier is allowed to say to the shipper, "You must bring your action for loss or damage within 90 days from the happening thereof, and you can recover only against the carrier on whose line the injury occurred, unless you sue the primary carrier, under authority of the Carmack amendment," certainly the shipper should have the right to say to the carrier who delivers his goods to him in a damaged condition, or fails to deliver them at all, "Then you must tell me when, where, and by which carrier in the route the damage was done, if you can get that information by the exercise of reasonable diligence."

For the foregoing reasons, the petition is dismissed. But, inasmuch as counsel for appellant have asked that the remittitur be further stayed to give them time and opportunity to apply to the Supreme Court of the United States for a writ of error, it is ordered that the remittitur be further stayed for a period of thirty days from the filing of this order.

MR. JUSTICE WATTS *concurring*. I gave my views in reference to the matters involved in this petition in my dissenting opinion in the case of *Varnville Furniture Co. v. C. & W. C. R. Co.*, 98 S. C. 86, 79 S. E. 708, but a majority of the Court decided otherwise and I am bound by that decision, and for this, concur in dismissing the petition herein.

MR. JUSTICE GAGE was not on the Court when this case was decided.

The case was carried on writ of error to the United States Supreme Court.

8928

STATE v. MITCHELL.

(82 S. E. 676.)

CRIMINAL PROCEDURE. FORMER JEOPARDY.

An acquittal on an indictment for burglariously breaking and entering a dwelling house in the nighttime with intent to steal certain goods, is a bar to a subsequent indictment for entering, without breaking, the same house at the same time with intent to steal the same goods.

Before BOWMAN, J., Abbeville, February, 1914. Reversed.

Bob Mitchell, being convicted of entering a dwelling house in the nighttime, without breaking, with intent to steal, appeals. The facts are stated in the opinion.

Mr. Wm. N. Graydon, for appellant, cites: Bishop Crim. Law, sec. 342, 559, 1057, 1064; 24 Conn. 57; Const. 1895, art. I, sec. 17; 46 S. C. 13; 65 S. C. 187.

Mr. Solicitor Cooper, for respondent.

REF.]

April Term, 1914.

August 29, 1914.

The opinion of the Court was delivered by MR. JUSTICE WATTS.

The defendant was indicted and tried at the February, 1914, term of the Court of General Sessions for Abbeville county for burglary. The indictment charging him with breaking and entering the house of Charles Manning, in the nighttime, with intent to steal the goods and chattels of the said Charles Manning. At the conclusion of the testimony the evidence showing the house was not broken into, the Court on defendant's motion, directed the jury to find a verdict of "not guilty," which was done. The Solicitor then handed out another bill of indictment, charging the defendant with entering the house of the said Charles Manning, without breaking, with intent to steal the goods and chattels of the said Manning. A true bill was returned by the grand jury, and the defendant again put on trial. Upon being called upon to plead, the defendant plead former acquittal, upon the ground that having been indicted for breaking and entering the house of Manning, with intent to steal the goods and chattels of Manning, and having been acquitted of that charge, he could not again be tried for entering the house of Manning with intent to steal his goods and chattels. This plea was overruled, and the defendant was put on trial, and convicted and sentenced. A motion was made at close of the evidence by defendant for a direction of verdict on the ground there was no evidence to warrant a conviction. After sentence defendant appealed on various grounds, none of which are necessary for this Court to consider except the plea of former acquittal. His Honor was in error in overruling this plea. Article I of sec. 17 of the Constitution of 1895 provides that: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or liberty." The defendant having been tried and acquitted on the charge of breaking and entering the dwelling house of Charles Manning, in

the nighttime, with intent to steal his goods and chattels, could not again be tried and convicted of entering the same house of the same man at the same time, without breaking, with intent to steal his goods and chattels, without violating this provision of the Constitution. *State v. Copeland*, 46 S. C. 14, 23 S. E. 980; *State v. Richardson*, 47 S. C. 166, 35 L. R. A. 238, 25 S. E. 220; *State v. Switzer*, 65 S. C. 187, 43 S. E. 513; *State v. Puckett*, 95 S. C. 114, 78 S. E. 737, 46 L. R. A. (N. S.) 999.

His Honor should have sustained the plea of former jeopardy and acquittal, and erred in not so doing.

Judgment reversed.

MR. JUSTICE HYDRICK dissents.

8929

CAROLINA RICE CO. v. WEST POINT MILL CO.

(82 S. E. 679.)

WAREHOUSEMEN. NEGLIGENCE. EVIDENCE. BURDEN OF PROOF. CHARGE ON FACTS. APPEAL AND ERROR. REQUESTS TO CHARGE. NONSUIT.

1. Where a warehouseman admits the receipt of goods, and injury to them while in its custody, the burden of proof is on it to show that the injury occurred without negligence on its part, and it is error, in such case, to charge that the bailor cannot recover damages unless he prove negligence on the part of the warehouseman.
- 1a. Jury properly instructed that the act of God must be the entire cause of loss of goods in custody of warehouseman in order to be a defense to the warehouseman.
2. Whether there is a difference between the terms "gross negligence" and "conscious failure to use due care" used as synonyms in a charge, will not be considered on appeal, where the trial Court was not requested to differentiate between the two terms.
3. A charge that "when the bailee or person in whose care the property is, has taken the same care of the bailed property as he did of his own, a presumption arises that he had exercised due care," *held*, erroneous, (a) presenting a false standard for the measurement of due care, and (b) instructing the jury what inference of fact should

REP.]

April Term, 1914.

be drawn from the testimony with reference to the exercise of due care by the defendant bailee.

4. A charge, "that where a bailee provides a place for the storage of goods, safe from all but extraordinary events, he is not liable for damages directly resulting from storm, tidal wave or flood, such as had occurred but twice in a generation," is upon the facts, and erroneous.
5. A nonsuit should not be granted where there is any evidence to go to the jury.

Before BOWMAN, J., Charleston, November, 1913. Reversed.

Action by Carolina Rice Company against West Point Mill Company. From a judgment for the defendant, plaintiff appeals. The facts are stated in the opinion.

The charge, to which the appellant excepted, was as follows:

Mr. Foreman and gentlemen of the jury, the allegation of the complaint is that heretofore, to wit: prior to and during the month of October, 1911, the defendant held in their warehouse for the account of the plaintiff a certain number of pockets of rice, etc. (Reading complaint.)

Now, gentlemen, the defendant answers and denies each and every allegation in said complaint contained, except as hereinafter admitted. (Reads answer.)

Now, gentlemen, stripped of all of its formalities, it means this, the plaintiffs allege that they had with the defendant a certain amount of rice which the defendant held as warehousemen, and that through the carelessness and negligence of the defendant that property was damaged, and they ask you to give them damages. Now, the plaintiff has to prove what he alleges, and, in a case like this, they cannot recover unless they can prove negligence or carelessness on the part of the defendant.

FOOTNOTE.—As to presumption and burden of proof as to care or negligence in respect to the subject of bailment, see note in 43 L. R. A. (N. S.) 1168.

Now, I charge you, that when property is left with a bailee as warehouseman, that then the warehouseman is charged with ordinary care and prudence, and if they show to you that they have exercised ordinary care, used and exercised ordinary care in caring for the property which has been left with them as warehouseman, then the plaintiff cannot recover, but if they have failed to use and exercise due care or prudence, and through their failure to exercise due care and prudence the plaintiff sustained loss or damage, then they are responsible for it; I also charge you, that if this property was left there, they paying nothing for it at all, and the defendants were a gratuitous bailee, getting no compensation for holding this property, then they would not be responsible for any loss or damage due to the want of ordinary care, but would only be liable for gross negligence, that would be for a conscious failure to use due care; if it was left there as a gratuitous bailee you could only make them pay in case they were guilty of gross negligence.

The defendant also alleges in its answer that this damage was due to an act of God. Now, if the testimony should show that this damage was due—resulted from an act of God or the public enemy, and the defendant was not in any way guilty of negligence which contributed as the proximate cause to this damage, then you would have to find for the defendant, but if the defendant was also guilty of negligence which co-operated with that, then they would be liable. To illustrate, suppose, Mr. Foreman, you had a carload of mules being brought into Charleston by the railroad, and there was a sudden storm and washed up the railroad at some of these points down here, now if the engineer of that train used due care and did not know that the road had been washed up and the train rushed into this place and your carload of mules were killed, and the engineer had used due care in running his train, then you could not recover, because that would be due to an act of God, not him; but if the engineer or officials of that road could have found out that

REP.]

April Term, 1914.

the road had been washed up and they failed to do it, then the road would be responsible for the damage. Now, that is the case here, if the plaintiff sustained this damage, this injury through the carelessness of the defendant in not doing their duty, even though that has come about through an act of God, they would be responsible, but if they were not guilty of carelessness they could not be held responsible.

Now, gentlemen, I am requested to charge you certain things, which I do, I charge you all of them.

These are the plaintiff's request to charge:

I. The jury are instructed that it is not sufficient to relieve the defendant from liability to show that the rice was injured by storm or *vis major*, but it must go further and show what precautions were taken to prevent such loss and that such loss was not due to or caused by any negligence or lack of care on its part. *McCord v. R. R.*, 76 S. C. 471, 57 S. E. 477.

II. If the jury find the defendant was carrying on business or acting as warehousemen, then they are instructed that the defendant is liable for negligence, and the burden of showing that it was not negligence in respect to the rice in its custody is upon the defendant. *Wardlaw v. S. C. R. R. Co.*, 45 S. C. L. (11 Rich.) 337.

III. In order to relieve itself from liability on the ground that the damages were caused by a storm or act of God, the defendant must further show that such storm or act of God was the sole and only cause of such loss, and that such loss was not due in any way to concurrent negligence on its part. *Fleischman v. R. R.*, 76 S. C. 247, 56 S. E. 974, 9 L. R. A. (N. S.) 519.

IV. The damage to the rice stored being admitted, the defendant to relieve itself of liability therefor, must show not only the isolated fact of its injury by the storm, but all the circumstances connected with the loss, as far as known to the defendant, and the precautions taken to prevent the loss or injury. From these facts, coupled with any testi-

mony on the subject the plaintiff may introduce, it is for the jury to say whether the defendant was negligent. *McCord v. R. R.*, 76 S. C. 471, 57 S. E. 477.

V. Good faith is not involved in the determination of the liability of the defendant. An honest man may be careless and indifferent with his own property. The question is, "Did the bailee, the West Point Mill Company, under the circumstances, do all that could be expected of a reasonable and prudent man?" *Scott, Williman & Co. v. Crews*, 2 S. C. 537.

VI. Even though no charge for storage as such was made by the defendant upon the rice of the plaintiff, yet if the jury find that such storage was for the mutual benefit and advantage of the defendant as well as plaintiff, then the defendant was responsible as a warehouseman, and would be liable for failure to exercise ordinary care.

VII. If the jury find that the defendant received no benefit from such storage and there was no consideration or advantage to it for so doing, but it was done solely for the benefit of the Carolina Rice Company, then it would be as a gratuitous bailee liable for its gross negligence. *Brunson v. R. R. Co.*, 76 S. C. 14, 56 S. E. 538, 9 L. R. A. (N. S.) 577n; *Glover v. Burbage*, 27 S. C. 308, 3 S. E. 471.

These are the defendant's requests to charge:

1. The jury is instructed that a warehouseman or bailee for hire is chargeable only with the duty of exercising ordinary care and diligence in the care of the goods entrusted to him. If, therefore, the jury find as a matter of fact, from the testimony, of which they are the sole judges, that the defendant, West Point Mill Company, was a bailee for hire, yet, if the jury further find that the defendant exercised reasonable care in the care of this rice, that is to say, such care as an average, prudent, reasonable man would have exercised in the care of his own property under similar circumstances, then the defendant has done its full duty as far as caring for the rice was concerned, and the verdict must

REP.]

April Term, 1914.

be for the defendant. *Carrier etc. v. Dowance*, 19 S. C. 32, 5 Cyc. 182.

2. The jury is further instructed that when the bailee or person in whose care the property is, has taken the same care of the bailed property as he did of his own, a presumption arises that he had exercised due care. 5 Cyc. 217.

I charge you, that is not a conclusion that he has exercised due care, but a presumption.

3. The jury is further instructed that a warehouseman, in the absence of an express agreement to that effect, does not undertake to insure the goods entrusted to him, but is only responsible for damages to them, resulting from negligence on his own part; it is therefore necessary not only for the plaintiff to show that the goods were lost or damaged, but for the jury to be satisfied from the evidence submitted to them that such loss or damage was caused by the negligence of the defendant as a proximate cause.

4. If the jury find as a matter of fact, from the evidence, of which they are the sole judges, that the defendant, West Point Mills Company, received no consideration for the storage of this rice for the plaintiff, Carolina Rice Company, but that such storage was gratuitous, then the plaintiff has the burden of proving that the damage to the rice was due to the gross negligence or fraud of the defendant, and unless the plaintiff has proved this to the satisfaction of the jury, the plaintiff cannot recover, and the verdict must be for the defendant.

5. The jury is further instructed, that in the case of a naked or gratuitous depository, the holder of the goods is not responsible for their loss or damage, unless his negligence was the immediate or proximate cause of such loss. Even, therefore, if the jury find that the defendant was negligent in its storage of the rice, yet if they also find that such storage was gratuitous and that the negligence of the defendant was not the proximate or nearest cause of the damage, then the plaintiff cannot recover, and the verdict

must be for the defendant. *Texas etc. v. Anderson*, 61 S. W. (Tex.) 424, 13 Cyc. 803, 39 Cyc. 504; *Lyons etc. v. The Bank*, 19 Am. Rep. 191.

6. The jury is further instructed, that if they find that the defendant, West Point Mills Company, received no consideration or payment from the plaintiff, Carolina Rice Company, for the storage by it in its storehouse of the rice in question, but that the storage of this rice by the West Point Mills Company was a mere accommodation on its part and was done gratuitously, and free of charge, for the accommodation of the Carolina Rice Company, or of the parties from whom the Carolina Rice Company had purchased the rice, and that the West Point Mills Company received no pay for such storage, then the defendant, West Point Mills Company, is not liable as a warehouseman, and is not responsible for the loss of or damage to the rice, unless the jury find that it was guilty of gross negligence or fraud in connection with the storage, and that such gross negligence or fraud was the proximate and nearest cause of the damage to the rice. *Glover v. Burbridge*, 27 S. C. 308, 3 S. E. 471; *Preston v. Prather*, 137 U. S. 608, 11 Supt. Ct. 162; *Prison v. Hoffman*, 72 S. E. (N. C.) 3.

7. The jury is further instructed, that if the plaintiff, Carolina Rice Company, voluntarily made the defendant, West Point Mills Company, its gratuitous depositary of this rice, it must be taken to have done so with reference to its known habits of business in regard to storage of rice. If it was the habit of the defendant to store rice as this rice was stored, the jury has no right to believe that it bound itself to exercise a higher degree of care in gratuitously allowing the rice to remain in its warehouse than it habitually exercised in its business. If, therefore, the jury find that the defendant received no pay or consideration for the storage of this rice and that it exercised the same care in caring for the rice of the plaintiff, Carolina Rice Company, as it was known by the plaintiff habitually to exercise in its

REP.]

April Term, 1914.

business, and in caring for its own rice, then the plaintiff cannot recover, and the verdict must be for the defendant. *Ibid.*

8. The jury is further instructed, that a flood or a high tide of extraordinary or exceptional size is what is known as an act of God, for the consequences of which, as a matter of law, men cannot be held responsible. If, therefore, the jury find that the rice was damaged by reason of such an exceptional high tide; and that this was the cause of its being damaged, then the defendant is not responsible for such damage, and the verdict must be for the defendant. *Ferguson v. Ry.*, 91 S. C. 61, 74 S. E. 129.

I charge you that, with the qualification that the defendant was not guilty of any negligence which was the proximate cause of the injury.

9. The jury is further instructed, that in passing upon the question as to whether or not the defendant exercised due precaution and adopted due means for saving from the high tide the goods entrusted to its care, the jury must consider the warning or want of warning which the defendant had, as to the approach of the high water; and the facilities or absence of facilities at hand for saving the goods in question; and if the jury find as a matter of fact, that the defendant did all that under the circumstances a reasonably prudent man could or would have done for the saving of his own goods; or if they find that under the circumstances a reasonable and prudent man could have done nothing to save his own goods before they were reached by the high tide; then the defendant has done its full duty in this particular, and the plaintiff cannot recover, and the verdict must be for the defendant.

10. The jury are instructed, that where a bailee provides a place for the storage of goods safe from all but extraordinary events, he is not liable for damages directly resulting from a storm, tidal wave or flood such as had occurred but

twice in a generation. *Pierce v. Thomas Newton*, 41 Fed. 106.

Now, gentlemen of the jury, the facts are for you, it is for you to say whether the defendant was a gratuitous bailee, and if you find that he was a gratuitous bailee, then I instruct you, that he was only required to exercise slight care, and the plaintiff could only recover against the defendant in case of gross negligence or fraud, the defendant would only then be responsible for conscious failure to do his duty.

The plaintiff has to make out his case by the greater weight of the testimony, and it is for you, you weigh it and when you come to make up your verdict, if you find that it balances, not in the number of witnesses, but in the amount of truth that it has brought to your mind, then you find for the defendant, but if you find that the plaintiff has made out his case by the greater weight or preponderance of the testimony, then it is your duty to find for the plaintiff. It is your duty to say how much if you find anything at all for the plaintiff; if you find that the plaintiff is entitled to damages you say how much; and if you bring in a verdict for the plaintiff, say, "We find for the plaintiff so many dollars," writing it out in words, not figures; and if you find that the plaintiff has failed to make out his case by the preponderance of the evidence and the defendant should win, then you write on here, "We find for the defendant," and sign your name as foreman.

The exceptions were as follows:

I. That his Honor, the presiding Judge, erred in charging the jury that, "in a case like this they (the plaintiff) cannot recover unless they can prove negligence or carelessness on the part of the defendant;" whereas, it is submitted that plaintiff having proved the damages to its property in the custody of the defendant as warehouseman, it was incumbent upon, and the burden of proof then was on the defend-

REP.]

April Term, 1914.

ant to prove that there was no negligence or carelessness upon its part.

II. That his Honor, the presiding Judge, erred in instructing the jury that if the defendant was a gratuitous bailee, it would only be liable "for a conscious failure to use due care," on the ground that it is not necessary to prove "a conscious failure to use due care" on the part of the defendant, as such a degree of carelessness is only necessary where exemplary or punitive damages are sought, while in this case the action is for compensatory damages only.

III. That his Honor, the presiding Judge, erred in charging the second request of defendant to the jury, as follows:

"The jury is further instructed, that when the bailee or person in whose care the property is, has taken the same care of the bailed property, as he did of his own, a presumption arises that he had exercised due care," and further charging, "I charge you, that is not a conclusion that he has exercised due care, but a presumption."

• Whereas, it is submitted that what defendant may have done with its own property is neither a conclusion or presumption that it has exercised due care and performed its legal obligations to the plaintiff, and its own acts regarding its own property is no legal standard or measure of comparison by which to judge or determine its due care to the property of this plaintiff, and it is submitted, that by the charge excepted to in this exception, the jury were led to believe that if the defendant stored its own rice as it did the plaintiff's, that then it had used due care and their verdict should be for the defendant.

And it is further submitted, that the said charge was a charge on the facts, because the presumption referred to is a presumption of fact and not a presumption of law, and in stating what was the presumption of fact or inference the jury should draw from the testimony as to defendant's care of its own goods, was a charge on the facts, prohibited by the Constitution.

IV. Because his Honor, the presiding Judge, erred in charging the jury as set forth in the fourth request of defendant, as follows:

"If the jury find as a matter of fact, from the evidence, of which they are the sole judges, that the defendant, West Point Mills Company, received no consideration for the storage of this rice for the plaintiff, Carolina Rice Company, but that such storage was gratuitous, then the plaintiff has the burden of proving that the damage to the rice was due to the gross negligence or fraud of the defendant, and unless the plaintiff has proved this to the satisfaction of the jury, the plaintiff cannot recover, and the verdict must be for the defendant."

Whereas, it is submitted, that plaintiff having shown the damages to its property on storage, whether such storage was gratuitous or not, the burden was on the defendant to show how the damages occurred, and that it was *not* due to its gross negligence if stored gratuitously.

V. That his Honor, the presiding Judge, erred in charging the seventh request to the defendant, as follows:

"The jury is further instructed, that if the plaintiff, Carolina Rice Company, voluntarily made the defendant, West Point Mills Company, its gratuitous depositary of this rice, it must be taken to have done so with reference to its known habits of business in regard to storage of rice. If it was the habit of the defendant to store rice as this rice was stored, the jury has no right to believe that it bound itself to exercise a higher degree of care in gratuitously allowing the rice to remain in its warehouse than it habitually exercised in its business. If, therefore, the jury find that the defendant received no pay or consideration for the storage of this rice, and that it exercised the same care in caring for the rice of the plaintiff, Carolina Rice Company, as it was known by the plaintiff habitually to exercise in its business and in caring for its own rice, then the plaintiff cannot recover, and the verdict must be for the defendant."

REP.]

April Term, 1914.

Whereas, the testimony showed that the plaintiff purchased rice from the owners thereof, while stored with the defendant to be removed in a reasonable time, and until the expiration of that time, or its removal, the duty of the defendant to such rice remained and its liability therefor was the same as to the original owners from whom it was accepted for storage.

And, further, because the defendant could not relieve itself of its liability or lessen the measure of care required, by its method of business or in caring for its own rice, nor could careless habits as to its own property justify carelessness to the property of the plaintiff.

VI. That his Honor committed error in charging, "if it was the habit of the defendant to store rice as this rice was stored, the jury has no right to believe that it bound itself to exercise a higher degree of care in gratuitously allowing the rice to remain in its warehouse than it habitually exercised in its business. If, therefore, the jury find that the defendant received no pay or consideration for the storage of this rice, and that it exercised the same care in caring for the rice of the plaintiff as it was known by the plaintiff habitually to exercise in its business, in caring for its own rice, then the plaintiff cannot recover, and the verdict must be for the defendant;" it being submitted, that this charge is erroneous on the ground that the habit or measure of care the defendant bestowed upon its own goods or what other persons bestowed on goods, was not the measure of due care that was the duty of defendant. On the contrary, the legal measure of the care that was due by the defendant was the care the defendant should have bestowed upon the goods as a reasonable, prudent person would have done.

VII. That his Honor, the presiding Judge, erred in charging the defendant's eighth request, as follows:

"The jury is further instructed, that a flood or a high tide of extraordinary or exceptional size is what is known as an act of God, for the consequences of which as a matter of

law, men cannot be held responsible. If, therefore, the jury find that the rice was damaged by reason of such an exceptional high tide; and that this was the cause of its being damaged, then the defendant is not responsible for such damage, and the verdict must be for the defendant," and adding, "I charge you that with the qualification that the defendant was not guilty of negligence which was the proximate cause of the injury." Whereas, it is submitted, that to avoid liability on the ground that the damages were due to the act of God, the defendant must go further and show that it was not negligent, or if negligent, that such negligence did not contribute to the damage, and that the act of God was the entire cause of the injury.

VIII. His Honor, the presiding Judge, committed error in a second time charging the jury that if the bailment was gratuitous, defendant would only then be responsible for "conscious failure to do his duty," and thus instructing the jury that it was necessary to find that the defendant wilfully failed to do its duty before it could be liable for damages to plaintiff, which is only necessary in an action for punitive or exemplary damages; whereas, this is an action for compensatory damages only.

IX. His Honor, the presiding Judge, erred in charging the jury as follows:

"The jury are instructed, that where a bailee provides a place for the storage of goods, safe from all but extraordinary events, he is not liable for damages directly resulting from storm, tidal wave or flood, such as had occurred but twice in a generation;" whereas, it is submitted, that the same is a charge on the facts, in that it instructed the jury that the defendant is not liable for damages from storm, tidal wave or flood as had occurred twice in a generation, independent of any other fact, condition, or consideration.

Messrs. Mitchell & Smith and J. P. K. Bryan, for appellant, cite: As to burden of proof: 76 S. C. 237; 11 Rich.

REP.]

April Term, 1914.

340; 76 S. C. 9; *Ib.* 471; 90 S. C. 85; 65 S. C. 509; 67 S. C. 201; 92 S. C. 104; 91 S. C. 65. *The rule in Federal Courts does not apply here:* 95 S. C. 488. *Conscious failure to use due care different from gross negligence:* 60 S. C. 74; 54 S. C. 505. *Charge on presumption from defendant's care of its own goods:* 60 S. C. 168. *Charge on facts:* 25 S. C. 30. *Right to support verdict for defendant by alleged right to nonsuit refused on Circuit:* 54 S. C. 363.

Messrs. Smythe & Visanska, for respondent, cite: *As to presumption of due care:* 76 S. C. 245; 5 Cyc. 217; 21 Am. Rep. 53. *Burden of proof:* 76 S. C. 9. *Charge as to duty of gratuitous bailee:* 76 S. C. 13-14; 27 S. C. 308; Story on Bailments, sec. 23. *Charge not on facts:* 41 Fed. 106. *Right to sustain verdict for defendant, because motion for nonsuit was improperly refused:* 45 S. C. 1; 65 S. C. 197; 50 N. W. 23; Rule 27 Supreme Court.

September 1, 1914.

The opinion of the Court was delivered by MR. JUSTICE FRASER.

The respondent is engaged in the business of cleaning rice for the producers. When this rice is cleaned and put into sacks, it is placed in respondent's warehouse. The producer sells the rice in the warehouse and the purchaser is allowed time to remove it.

The appellant purchased a lot of rice in these warehouses and before its removal, a storm came and flooded the warehouse and injured the rice. The appellant brought this action for the injury to the rice. The respondent admitted the damage while in its possession, but claimed that the bailment was gratuitous and that the injury was caused by the act of God. The verdict was for the defendant and the plaintiff appealed upon nine exceptions, but argues four propositions.

The first proposition is as follows:

"That the rule of law in this State, in the case of a warehouseman, is that upon admission or proof of delivery of goods and failure to return same in condition received, the burden of proof is upon the warehouseman to show

1 that the loss or damage was not due in any way to its negligence and that if such loss or damage occurred through the act of God, that such act of God was the entire cause of such loss or damage. That the burden of proof is the same whether the bailment be for hire or gratuitous, the only difference being that in case of a gratuitous bailment the warehouseman is liable only for gross negligence."

His Honor charged the jury as follows:

"Now, the plaintiff has to prove what he alleges and in a case like this they can not recover unless they can prove negligence or carelessness on the part of the defendant."

In *Fleischman v. Ry.*, 76 S. C. 247, 56 S. E. 974, 9 L. R. A. (N. S.) 519, this Court held that the burden of proof was on the warehouseman for the reason that the facts were within the knowledge of the defendant and not with the plaintiff. See, also, the recent case of *Meyer v. Railroad Company*, 92 S. C. 104, 75 S. E. 209.

His Honor charged the jury that the act of God must be the entire cause of the loss with sufficient clearness.

This proposition is sustained in part, for the reason above set forth.

The second proposition is as follows:

"That even if the bailment be gratuitous, a warehouseman is responsible for its gross negligence, and to subject it to liability therefor it is not necessary that it should have acted with a conscious failure to observe due care,

2 that is, in a wanton, wilful and reckless manner, unless in addition to compensatory damages punitive damages are sought for such wanton, wilful and reckless acts."

This proposition can not be sustained; if the appellant desired the trial Court to differentiate between "gross negli-

Rep.]

April Term, 1914.

gence" and a "conscious failure to observe due care," it ought to have made a request.

The third proposition is as follows:

"Negligence is the absence of due care, and what a bailee chooses to do with his own property or what risks he

3a may assume in connection therewith has no relevancy to and is no test of the legal obligation to the property of a bailor, which the law imposes."

This proposition is sustained. The respondent has not cited any binding authority which holds that a warehouseman can reduce his liability for goods of others entrusted to him by neglecting his own.

The fourth proposition is as follows:

"That in addition his Honor charged directly on the facts of the case, contrary to the constitutional inhibition 3b, 4 as set out in the third and ninth exceptions of the appellant."

This proposition is sustained. The charge that the defendant was not liable for the consequences of a storm that had not only occurred twice in a generation, was a charge on the facts. The federal case relied upon is not authority in our Courts. The latitude allowed a federal Judge in charging a jury on the facts is great. In our State no charge on the facts is allowed. The third exception has already been considered.

The respondent seeks to sustain the judgment because it claims its motion for a nonsuit should have been granted. There was evidence to go to the jury. Inasmuch as the case has to go back for a new trial, a discussion of the facts would be improper.

The judgment is reversed and the case remanded for a new trial.

MR. JUSTICE HYDRICK concurs in the result only.

MR. JUSTICE GAGE dissents.

8930

DIX, AS ADMX., v. ATLANTIC COAST LINE R. R. CO.

(82 S. E. 798.)

RAILROADS. NEGLIGENCE. CONTRIBUTORY NEGLIGENCE. NONSUIT.

1. The running backwards of the train by which decedent was struck and killed was not negligence *per se*, where it was run at a reasonable speed and a lookout was kept on the front car, who was able to signal the engineer.
2. That the engineer of a train running backwards could not see the track ahead of the train when decedent was struck and killed was not negligence, where the conductor had stationed himself on the forward car to keep a lookout and signal the engineer of approaching danger.
3. Where, at the time a railroad conductor standing on the front car of a train running backwards, discovered decedent on the track, there was nothing to indicate that decedent was not in the possession of all his senses, the conductor was entitled to assume that he was and would get out of the way.
4. Where decedent, a water carrier employed by a railroad construction contractor, with knowledge that he was too deaf to hear an approaching train, went on the track in front of a train, running backwards, in plain sight, and was struck and killed, though attempts were made by persons on the end of the train to warn him to get out of the way, he was guilty of contributory negligence, and no recovery could be had for his death.

Before C. J. RAMAGE, special Judge, Monk's Corner, November, 1913. Reversed.

Action by Katie Dix, as administratrix of the estate of Peter Maxwell, against Atlantic Coast Line Railroad Company. The facts are stated in the opinion. From a judgment for plaintiff, the defendant appeals.

Messrs. Mordecai, Gadsden & Rutledge, Simeon Hyde and Octavus Cohen, for appellant, submit: Deceased assumed the risk of his employment, and such assumption need not be plead affirmatively: 22 S. C. 557; 70 S. C. 470; 72 S. C. 237; 77 S. C. 328; 84 S. C. 283; 41 S. C. 388. He chose the obviously unsafe way: 61 S. C. 489; 81 S. C.

REF.]

April Term, 1914.

530; 82 S. C. 542; 84 S. C. 364; 85 S. C. 363; 89 S. C. 502; 72 S. C. 97; 86 S. C. 69; 55 S. C. 483; 80 S. C. 232.

Messrs. W. A. Holman and E. J. Dennis, for respondent.

September 2, 1914.

The opinion of the Court was delivered by MR. JUSTICE HYDRICK.

This appeal is from a judgment against defendant for \$1,000 damages for the wrongful killing of Peter Maxwell, who was twenty-nine years old, and was employed as a water carrier for a construction force, engaged in double tracking defendant's road.

Following is the substance of the testimony which is pertinent to the issues:

For plaintiff: W. A. Smoak—Was engineer of a work train, consisting of nine flat cars, loaded with steel rails, which were being pushed backwards on the main line, at a speed of from fifteen to eighteen miles an hour, past the place where the construction force was at work; was on the right-hand side of the engine, going north; deceased came on the track from the left; there were twenty-five or thirty negroes on the cars—some sitting and some standing—and he could not see deceased, though he was looking ahead, but his view was not obstructed over the end of the cars, or to his right; did not see deceased, until his engine passed him where he was lying on the side of the track; the construction company had a train which was being constantly run back and forth hauling earth, and there were other trains constantly passing; this was known to all concerned; there was a path about two feet wide alongside the track, in which deceased could have walked with safety, and it was a better place to walk than on the track.

For defendant: S. E. Dickson—Was conductor of the train, on the forward car, looking ahead; first saw deceased

about 250 to 300 feet ahead of the train; he was then on the new track, talking to the foreman; he walked across and got on the main line, and walked about the length of a rail, and then turned, quartering from the way they were going, so that he thought deceased was going to get off the track; he turned his head, as though he saw the train, and was going to get off the track, but did not do so, and, as soon as he concluded that deceased had not seen the train, he began shouting at him and waving the engineer to stop, who responded to the signal by putting on the airbrakes; the engineer could have seen deceased, if he had been permanently on that side of the track, but he was on that side only six or eight seconds before he was struck; no warning signal was given, at that time, other than the shouting at deceased, though the crossing signal—four blasts of the whistle—had been given three hundred feet further back; did not think it would have been possible for the engineer to have stopped the train in time to prevent the accident, after deceased came on the track, even if he had seen him.

M. M. Worthington, engineer of construction work—Was riding on front car with conductor; saw deceased on the track about four car lengths ahead; as he did not get off, yelled at him, and, when train was five or ten feet from him, screamed at him as loud as he could, but deceased did not get off, and was struck by the end of the car.

A. H. Haxston, assistant engineer of construction work—Was on front car; heard a lot of shouting; looked up and saw deceased forty or fifty feet ahead, walking along the end of the crossies; the conductor had his arms out—the stop signal—and witness felt the airbrakes go on; deceased did not appear to hear the shouting, or the noise of the train; there was a path alongside the track in which deceased could not have been hurt; crossing signal had been blown 400 or 500 feet from where deceased was struck.

Hyman Brenner—Knew deceased for past eight to twelve years; he was hard of hearing; talking face to face, he

REF.]

April Term, 1914.

would know what you were saying, but let him turn his head, and from five to ten feet off, he could not hear anything; think he could have heard a train blow, if it was very near.

The Court below was requested to direct a verdict for defendant, on the ground that there was no evidence of negligence on the part of defendant, and, if so, that deceased was guilty of contributory negligence, and assumed the risk of injury in walking upon the track.

The motion should have been granted. There was no evidence that defendant's track was used as a walkway at the point where deceased was killed, either by the construction force or others, so as to charge defendant with

1-3 notice that it might expect to find persons on or near the track; but, assuming that the fact that construction work was going on at that place imposed upon defendant the duty of exercising care commensurate with the knowledge that it might expect to find persons on or near the track, there is no evidence from which it can be inferred that such care was not observed. The fact that a train is run backwards is not, *per se*, evidence of negligence, if it is done at a reasonable speed, under the circumstances, and a proper lookout is kept, because it is often necessary to do so. There is neither allegation nor proof that the speed was unreasonably fast or that a proper lookout was not kept, as in *Sanders v. Ry.*, 90 S. C. 331, 73 S. E. 356, and *Dimery v. R. Co.*, 92 S. C. 169, 75 S. E. 399. Nor can anything be made of the fact, if it be a fact, that the engineer could not see the track ahead of the backing train, because the possibility of his being unable to do so was provided against in having the conductor on the forward car to keep a lookout, and signal him of approaching danger, which was done, and the signal was promptly responded to by the application of the airbrakes.

The only allegation of negligence is that the train was being run backwards, and that the view of the engineer was

obstructed, so that he could not see the track in front of the moving train; but if by possibility this allegation may be regarded as sufficient to sustain a recovery on the ground that the conductor was negligent in failing to give the signal more promptly, let us examine that aspect of the evidence. When he first saw deceased, there was nothing to indicate to him that he was not in possession of all his senses. He had the right to assume that he was, and that he would get out of the way, and it appeared to him that he was going to do so. In *Cable Piano Co. v. Ry.*, 94 S. C. 143, 77 S. E. 868, the Court said: "As there was nothing to indicate that the driver of the team was not in possession of his faculties, the engineer had a right to assume that he would exercise them, and not drive upon the track in front of the approaching train." The conductor gave the stop signal and did all that he could to warn deceased of his peril, as soon as he discovered that he had not seen or heard the train. There is, therefore, nothing in the evidence to warrant the inference that the conductor was guilty of negligence.

It remains to inquire whether deceased was guilty of negligence in walking upon the track, knowing that he was so deaf that he could not hear an approaching train, without even taking the precaution to look; for, if he had
4 looked, he could have seen the train. In *Cable Piano Co. v. Ry.*, *supra*, the Court said: "The law imposes upon every capable person the duty of observing due care for his own safety, when about to cross a railroad track, which necessarily involves the exercise of his senses." The conclusion is inevitable that deceased's own negligence was the cause of his death; and that, even if the evidence warrants an inference of negligence on the part of defendant, he was guilty of contributory negligence, which bars a recovery.

This case is easily distinguished from that of *Carter v. Ry.*, 93 S. C. 329, 75 S. E. 952, which is similar in some of its features. In that case, Carter was seen on the track a

REP.]

April Term, 1914.

thousand feet away, and though the crossing signal was scounded at that distance from where he was seen, and it was apparent to those in charge of the train that he continued to walk on the track and did not appear to be conscious of the approach of the train, no other warning was given of the approach of the train, or attempt made to prevent the accident until it was apparent that deceased was going to be struck, when it was too late. In this case, warning, by the shouts of the conductor and others on the train, was given in time for deceased to get off the track, if he had been able to hear it, and the warning was given as soon as the conductor discovered that he had not seen or heard the train. Moreover, in the Carter case, the majority of the Court thought that the evidence warranted the finding that defendant was guilty of wilfulness and wantonness, which was sufficient to prevent the contributory negligence of deceased, if he was guilty of contributory negligence, from barring a recovery, while, in this case, there is nothing in the evidence to warrant an inference of recklessness, wilfulness or wantonness on the part of defendant.

Judgment reversed.

MR. JUSTICE FRASER, *concurring*. I concur in the result on the ground that there is no evidence of negligence on the part of defendant.

8931

STATE v. LEMACKS.

(82 S. E. 879.)

HOMICIDE. APPEAL AND ERROR. EVIDENCE. CONFESSIONS. CHARGE.
STATEMENT OF ISSUES.

1. The evidence as to the circumstances under which a homicide was committed being conflicting, the question should be submitted to the jury.
2. A ruling that a question, asked a prosecuting witness, father of deceased, on cross-examination by defendant's counsel, "So then, they were not on good terms the Thursday afternoon that I. S. Lemacks (defendant) went to your house to see your son (deceased) about the way he had outraged his sister?" is irrelevant and incompetent, on a trial for murder, is not reviewable on appeal, where the answer was subsequently admitted, and not prejudicial to defendant, who admitted the existence of ill will between him and the deceased at the time in question, and this was not denied by the State.
3. The admission of an alleged confession, over objection as not free and voluntary, substantially the same as other statements of defendant admitted without objection, and tending to corroborate statements of defendant in Court, as to the cause leading to the commission of the homicide, is not prejudicial to defendant, and will not be reviewed on appeal.

MESSRS. JUSTICES WATTS and GAGE dissent.

4. Exclusion of testimony of a sister of defendant as to her ill treatment by deceased prior to the homicide, not admissible to show malice on part of deceased toward defendants, and tending to show cause for ill will by defendant toward deceased, *held*, not prejudicial to defendant on his trial for murder.
5. Where defendant indicted for murder attempted to show that he had been moved to take the life of deceased because of an outrage committed against his sister, and counsel argued the right of a brother to slay his sister's seducer, a charge that: "This Court has jurisdiction of every crime and offense committed in this State. No one has a right to appeal to any other tribunal, and if a man pleads the higher law he is guilty of murder. I won't say if he pleads it he is guilty of murder, but he has no right to say he took the law into his own hands. The higher law has not any force in South Carolina." *Held*, by a majority of the Court, not error.

MR. JUSTICE WATTS dissents.

6. Where defendant contended on trial that he was moved by an outrage committed against his sister by deceased to kill the latter, and did not rely upon insanity as a defense; a charge that insanity was not pleaded as a defense, was not prejudicial to defendant; espe-

REP.]

April Term, 1914.

cially where the trial Judge added, that it was a question for the jury to determine whether the defendant had sense enough to know whether he was doing right or wrong.

MESSRS. JUSTICES WATTS and FRASER dissent.

7. A majority of the Court concurring in the opinion, though not in the reasons why, a new trial should be granted, it is so adjudged.
8. (By GAGE, A. J.) On a trial for murder, the jury should be fully instructed as to its power (in effect) to fix the penalty by finding, or omitting to find, a recommendation to mercy, in case the defendant is guilty of murder.

Before BOWMAN, J., Walterboro, November, 1913.
Reversed.

The defendant, I. S. Lemacks, being convicted of murder, appeals. The facts and exceptions are stated in the opinion. The charge as to the form of verdict was as follows:

"If you find the prisoner guilty of murder and there are no extenuating circumstances you just say guilty and write your name under there with the word foreman, and that means that the defendant will suffer death in the electric chair, but if you find that even though you think he is guilty, something that makes you feel he ought not to suffer death, then say guilty of murder with recommendation to mercy, then the law as made by the legislature is that he shall spend the remainder of his life at hard labor on the public works of this county or in the State penitentiary, if you find that he is guilty of manslaughter, and sign your name as foreman, and that means that the Court will put punishment on him somewhere between two and thirty years in the discretion of the Judge, if you find that he has made out his plea and that he is not guilty it is as much your bounden duty to say not guilty as it is to say guilty, so write the word not guilty and sign your name as foreman.

Now, you are upon your oath to get at the truth and it is your duty to try your best to bring in a right verdict. Retire and find a verdict.

The jury returned for instructions and the foreman requested the Court to instruct them on the following point:

The Foreman: The jury wants to know if a man is found guilty of murder, absolutely clear in the jury's mind that he is guilty of murder, has a juror any right under the law and his oath taken as a juror to recommend to mercy?

The Court: If you think he ought not to suffer death; if you think there are extenuating circumstances the law gives you the right to recommend him to mercy, that is always in the power of the jury; before 1894, if the jury recommended to mercy the Judge could not act, it was left with the Governor, but in 1894 the legislature passed a law making it life imprisonment when the jury recommended to mercy."

Mr. D. B. Peurifoy, for defendant-appellant, cites: *As to question asked father of deceased with reference to terms existing between the latter and defendant*: 93 S. C. 157. *As to admission of confession*: 12 Cyc. 461, 462, 469, 477; 5 Rich. 400; 1 Strob. 155; 34 Am. Dec. 674; 27 S. C. 22, 27; 36 S. C. 532; 14 S. C. 628; 1 Greenleaf Ev. 290, 302. *Second confession founded in first*: 23 Am. St. Rep. 533; 12 Cyc. 480; 5 Fla. 285; 22 Ark. 336; 111 Mass. 435; 36 Tex. 356; Wharton Crim. Ev. 677; 54 Mo. 478; 17 N. H. 171; 50 Ala. 120; 36 S. C. 532; 35 S. C. 197. Further submitted that in his argument on Circuit before the jury, "he argued a right on the part of a brother to slay his sister's seducer.

That the Judge, in stating that any one who pleads the higher law is guilty of murder was referring to the defendant. The trial Judge intimated that the defendant was relying on the higher law; and in the next breath stated that a person pleading the higher law was guilty of murder. The charge was an unsound proposition of law, for

REP.]

April Term, 1914.

a person may rely on the higher law, and only be guilty of manslaughter or even excusable."

Statement as to defense of insanity a charge on the facts: Const. 1895, art V, sec. 26.

Mr. James E. Puerifoy, Acting Solicitor, and Messrs. Padgett & Moorer, for the State, respondent. The latter cite: Issue for jury: 30 S. C. 74; 68 S. C. 304; 72 S. C. 194; 36 S. C. 487; 15 S. C. 153. No abuse of discretion in admitting testimony as to confession: 74 S. C. 477; 69 S. C. 72; 49 S. C. 550; Ib. 410; 74 S. C. 551; 36 S. C. 524. Testimony of sister as to alleged assault irrelevant: 79 S. C. 80. Charge as to so-called higher law: 79 S. C. 80, 83. Insanity as defense: 20 S. C. 441; 32 S. C. L. 479.

September 8, 1914.

The following opinion was delivered by MR. CHIEF JUSTICE GARY.

The defendant, I. S. Lemacks (generally called "Cap" Lemacks), was tried at the November term, 1913, of the Court of General Sessions for Colleton county, on an indictment charging him with the murder of Aquilla Blocker (commonly known as "Quillie" Blocker).

The jury rendered a verdict of guilty of murder, and he was sentenced to be electrocuted.

From said sentence he appealed to this Court on several exceptions, the first of which was as follows:

(1) "The presiding Judge erred in not granting defendant's motion for a new trial, there being no competent evidence to support the verdict."

This exception was not argued, but, waiving such objection, it cannot be sustained, as the defendant admitted
1 that he had killed the deceased with a deadly weapon, and the testimony was conflicting as to the circumstances under which the homicide was committed.

Second Exception. (2) "The presiding Judge erred in sustaining the objection of the State, and ruling that the witness, T. J. Blocker, was not required to answer the following question: 'So then they were not on good terms Thursday afternoon, that I. S. Lemacks went to your house to see your son about the way he had outraged his sister?' The error assigned being that the question was perfectly competent, and a vital point in the case."

The appellant's attorney in his written argument,

2 thus states the object of the testimony:

"The purpose of this question was to show the motive of the killing, to discredit the witness and to fix the time, when the bad feeling arose between the defendant and the deceased. The theory of the State was, that the object of the killing was robbery, while the defense was, and the burden of the testimony showed, that the defendant killed the deceased on account of an outrage on his sister. It will be seen from the testimony that the deceased, hearing defendant's sister say that she was going over to her brother's, in the afternoon, waylaid her on the road, and at the point of a pistol accomplished his purpose. Several days later, the defendant noticed that she was crying, asked her what the trouble was, and she told him that she had been insulted by Blocker. The defendant then got his shotgun, went over to Blocker's, and what transpired there will be seen from the testimony:

"Q. You all had a talk there? A. Yes, sir; I cursed him for everything I could think of. Q. Did you all adjust the difference between you? A. Yes, sir; certainly did; shook hands on it; it was never to be brought up again. Q. Did he deny that he had done anything? A. Denied it; said that he had asked an unfair question; said that was all that passed. Q. Why did he say he had insulted your sister? A. Said it was the fault of liquor, and begged to be excused, forgiven. I told him I would forgive him, my sister had denied it to me."

REP.]

April Term, 1914.

There are two reasons why this exception cannot be sustained. In the first place, the witness was allowed to answer the question. And, in the second place, it was admitted by the defendant, and not denied by the State, that there was bad blood between the parties, or at least ill will on the part of the defendant, towards the deceased, when he went to see Blocker on Thursday, prior to the homicide. Furthermore, such testimony would have tended to show that the appellant was guilty of murder, after the parties had adjusted their differences, in the manner just mentioned. There was also testimony to the effect that the deceased went to the home of defendant on Friday evening, after they had agreed that the matter was never to be brought up again, and invited Lemacks to go coon hunting with him next morning, which he did. When they returned from the coon hunt, they went to a neighbor's for a hog, and returned together to the home of the deceased. The deceased then started to a neighbor's to buy cattle, and the defendant went with him, for the alleged purpose of hunting his dog, which was lost in the woods. Blocker was found dead in the woods, near which the parties were last seen together.

This exception is overruled.

Third Exception. "The presiding Judge erred in permitting the witnesses, Dave Blocker and John Nettles, constables in charge of the defendant, to testify as to a confession claimed to have been made by the defendant on way to jail, the said confession not being made freely and voluntarily, but made under duress and influence of hope."

His Honor, the Circuit Judge, ruled that the testimony of Dave Blocker as to confessions made to him by the appellant, in the presence of J. C. Nettles, were admissible in evidence. Afterwards, when J. C. Nettles testified as to the confession made to him by the appellant, in the presence of Dave Blocker, the presiding Judge ruled that they were incompetent. The State then proceeded to interrogate the

witness, as to confessions thereafter made by the defendant, when being brought from the penitentiary by Nettles, whereupon the Circuit Judge made the following ruling:

"The Court: I understand the facts are these: That these men made certain inducements to him, and offered to help him if he would tell what happened, and the defendant did make a statement to him telling him certain things he had done; now this same defendant was afterwards sent to the penitentiary for safe-keeping, and this same constable went to bring him back. Now, on his return back, he voluntarily volunteered to tell him what he said before. Go ahead and tell it."

The witness then testified as follows:

"A. He said that he and Blocker were in the creek, and they had a scuffle and a skirmish, and the gun was off a piece lying by a tree, and they both ran for the gun, and he beat Blocker to the gun, and Blocker started to walk off about eight feet from him, and he shot him. Q. Did he say where he hit him? A. No, sir; he didn't say. I then asked Mr. Lemacks why did he kill him. He said, well, I killed him because he treated my sister like a dog. Q. That is what he told you on the way from Columbia? A. No, sir. Q. He told you that on the way to jail, and corroborated it on the way from Columbia? A. Yes, sir. Q. When did you bring him from Columbia? A. Last Sunday."

The defendant did not deny that he killed the deceased. He also introduced his sister as a witness, for the purpose of showing that he had killed Blocker on account of his conduct towards her. Furthermore, J. H. Johnson testified, without objection, as to confessions made to him by defendant, which were substantially to the same effect as those made to Blocker and Nettles.

Under such circumstances, it cannot be successfully contended that the testimony of the constable was prejudicial to the rights of the defendant, especially when we recall the

REP.]

April Term, 1914.

statement of appellant's counsel that "the defense was, and the burden of the testimony showed that the defendant killed the deceased on account of an outrage on his sister."

Fourth and Fifth Exceptions. 4. "The presiding Judge erred in refusing to allow the witness, Meta Lemacks, to testify how she had been treated by deceased, prior to the killing, the same being a material point in the case, and the cause that led up to the killing."

5. "The presiding Judge erred in refusing to allow the witness, Meta Lemacks, for the defendant, to testify as to her condition and state of mind after she had been assaulted by the deceased, the same being important to show what actuated the defendant, and what was the cause of the killing."

The only purpose for which the testimony mentioned in those exceptions was competent, was for the purpose
4 of showing the ill feeling of the defendant against the deceased, and, this was not only amply shown by the testimony of this witness and others, but by the admissions of the defendant.

Such testimony was not admissible to show malice on the part of the *deceased* against the *appellant*. *State v. Harmon*, 79 S. C. 80, 60 S. E. 230.

Sixth Exception. "6. The presiding Judge erred in charging the jury as follows: 'This Court has jurisdiction of every crime and offense, committed in this State, no
5 one has a right to appeal to any other tribunal, and if he pleads the higher law, he is guilty of murder.' The error assigned being that the same was bad law, a charge on the facts, and tantamount to saying, 'in this case the defendant has pleaded the higher law, and is therefore guilty of murder.'"

The sentence quoted in the exception is only a part of what his Honor charged in this respect. He also charged as follows:

"I heard something here in this case about the higher law, the higher law in South Carolina, the highest law in South Carolina is in this courthouse. This Court has jurisdiction of every crime and offense, committed in this State. No one has a right to appeal to any other tribunal, and if a man pleads the higher law, he is guilty of murder. I won't say if he pleads it, he is guilty of murder, but he has no right to say he took the law into his own hands. The higher law has not any force in South Carolina. I address this to all the audience here. We very often think there are circumstances when we are justified in taking the law into our own hands, and inflicting punishment. I tell you that is wrong. In this civilized country of ours, if a man commits the highest offense, we ought to bring him into this courthouse and punish him. That has nothing to do with this case. I only tell you that the laws of the State of South Carolina, ought to be enforced in this Court, and I am going to do my duty, and I believe you will do yours. I believe you are just as fearless as I am, and I am going to do my duty. You take the law as you get it from me, and the testimony as you get it from that stand."

In the case of *State v. Harmon*, 79 S. C. 80, 60 S. E. 230, this Court used the following language, in regard to the so-called unwritten or higher law :

"The course of counsel for defense, in not appealing to the so-called unwritten law, was highly commendable. But it was not the less the right and manifest duty of the Circuit Judge to warn the jury of their obligation to try the cause, not by such so-called unwritten law, but by the law of the State. If this warning was detrimental to the defendants, it could only have been so because they had taken human life, in violation of the law of the land."

When that part of the charge in the exception is considered in connection with the other portion which we have quoted, it will at once be seen, that the exception cannot be sustained.

REF.]

April Term, 1914.

We take this occasion to express in unmeasured terms our commendation of the views expressed by his Honor, the Circuit Judge, and those announced in the case of the *State v. Harmon, supra*, by his Honor, Mr. Justice Woods, to whom it gives us pleasure to refer, as one of the ablest and most illustrious jurists that ever adorned the bench in South Carolina.

Seventh Exception. 7. "The presiding Judge committed error in answering the following question of the foreman of the jury: 'In a case of this kind evidence of insanity, as exhibited by a man charged with a crime, would the jury be justified in having doubt as to his guilt, or not?' The error assigned being that the statement of the Circuit Judge, 'The plea of insanity was not put in as a defense,' was a charge on the facts, and prejudicial."

The record shows that the following took place: "The jury returned for instructions, and the foreman requested the Court to instruct them, on the following point:

"In a case of this kind, evidence of insanity as exhibited by a man charged with a crime, would the jury be justified in having doubt as to his guilt or not?"

The Court: I cannot answer that. The plea of insanity was not properly pleaded in this case, it was not put in as a defense. I cannot help you as to that. I have nothing to do with your doubts. I have charged you as to the law of reasonable doubt. I will charge you, that if a man sets up as one of his defenses, that he was insane at the time he did the deed, the burden of proof is on him to prove that he was insane. If he was able, Mr. Foreman, to know right from wrong, that is a question for you, if he had enough sense to know whether he was doing right or wrong, he would be responsible."

While his Honor, the Circuit Judge, ruled that insanity had not been interposed as a defense, nevertheless he gave the appellant the benefit of such defense when he charged

"If he was able, Mr. Foreman, to know right from wrong, that is a question for you, if he had enough sense to know whether he was doing right or wrong, he would be responsible." *State v. Bundy*, 24 S. C. 439.

The following statement in the argument of the appellant's attorney, together with that hereinbefore mentioned, shows that insanity was not relied upon as a defense: "The theory of the defense was, that the motive of the defendant in taking the life of the deceased was because he had outraged his sister."

MR. JUSTICE HYDRICK concurs in the opinion announced by the CHIEF JUSTICE.

The following opinion was announced by MR. JUSTICE WATTS:

I cannot concur in the opinion of the Chief Justice. I think the Circuit Judge was in error in permitting the witnesses, Dave Blocker and John Nettles, to testify over objection as to the alleged confession of the defendant as

3 it was made beyond question under an inducement or reward, and confessions made and testified to by officers should always be received with caution, and the Court before receiving it should have it to be made clear that it was free and voluntary and not under duress or the party making it was uninfluenced by hope of help or reward. The Court found that the defendant was offered certain inducements by the constables, and they offered to help him if he told what happened, and upon these promises the defendant made certain statements, later he was sent to the penitentiary and was brought back by one of these constables and he repeated to him the same statement. It follows that if his first statements were made by promise to help him and was not such a free and voluntary statement as could be received as competent evidence then the same objection could be made to the last statement. The defendant

REP.]

April Term, 1914.

had every reason to assume that the promise to help him by the same constable held good, and that he was talking to one who was his friend and had promised to aid and assist him.

The sixth exception should be sustained. His Honor violated the plain mandate of the Constitution, which forbids the Judge to charge on the facts. The defendant had attempted to show that the deceased had outraged
5 his sister and they had discussed it. What took place between the deceased and the defendant in the conversation that led up to the difficulty was competent. Either the State or the defendant had the right to show by words, acts or deeds the mental attitude of each other at the time of the killing, and it was competent for the defendant to show that the quarrel arose by reason of the information he had received that his sister had been assaulted and maltreated, this information was conveyed to the deceased, and it was for the jury to say whether this was true or not, and for them to determine whether the defendant maliciously killed the deceased or whether he killed him in heat and passion upon sufficient legal provocation, or acting in self-defense; and his Honor should not have used the language he did to the jury charged with trying a person charged with a capital offense. It might be all right in a charge to the grand jury. Telling the jury that anyone who plead the higher law was guilty of murder, taken in connection with the effort defendant had made to show that the ill use accorded his sister by the defendant brought about the difficulty, was highly prejudicial to the defendant and no doubt influenced the jury. The Constitution of 1895 in respect to the power and duty of the Judge in charging juries is quite different from the Constitution of 1868, and was clearly understood by the bench and bar and people as intended to leave the jury sole judges of the facts uninfluenced by the Court, and it would be a safe practice for the Court to declare the law in a plain, short way.

The seventh exception should be sustained. When the defendant put in the plea of "not guilty" that carried with it all defenses, and he could have put in the plea of insanity, if he saw fit, and have introduced evidence as to his mental condition. But if he was insane at the time of the trial or became insane after trial commenced, the jury could have taken that into consideration. The Judge in answer to question of the foreman took from the jury that question, because he had not plead insanity. The question itself shows that the jury had some doubts as to his sanity, and by the action of the Judge the defendant was deprived of the right of the jury to consider that question. This alone, in my opinion, should require the verdict to be set aside, as it deprived the defendant of a substantial right and was highly prejudicial. I think that the judgment should be reversed and a new trial granted.

A majority of the Court being of opinion that a new trial should be granted, it is the judgment of the Court
7 that the judgment be reversed and a new trial granted.

MR. JUSTICE FRASER, *concurring*. I concur with the Chief Justice in all except the seventh exception. As
6 to the seventh exception, I concur with MR. JUSTICE WATTS.

MR. JUSTICE GAGE, *concurring*. I am of the opinion a new trial should be granted: (1) Because the defendant's confession was involuntary, and (2) because the
3, 8 jury was not fully instructed about its full power (in effect) to fix the penalty,—a matter which gave the jury very grave concern.

END OF THIS VOLUME.

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Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453.....	28
Adams Express Co. v. Croninger, 226 U. S. 491; 33 Sup. Ct. 148; 57 L. Ed. 314, 69, 76, 79, 84. 85, 88, 470	
Aldrich v. So. Ry. Co., 95 S. C. 427; 79 S. E. 316..95,	105
Archer v. Ellison, 28 S. C. 238; 5 S. E. 517.....	461
Archer v. Long, 32 S. C. 186; 11 S. E. 86.....	406
Armour Packing Co.'s Case, 209 U. S. 57; 28 Sup. Ct. 428; 52 L. Ed. 681.....	95
Asbell v. Kansas, 209 U. S. 251; 28 Sup. Ct. 485; 52 L. Ed. 778; 14 Ann. Cas. 1101.....	73
Atchison, T. & S. F. R. Co. v. Wilson, 1 C. C. A. 25; 4 U. S. App. 25; 48 Fed. Rep. 57.....	56
A. C. L. R. R. Co. v. Mazursky, 216 U. S. 122; 30 Sup. Ct. 378; 54 L. Ed. 411.....	66, 68, 470
A. C. L. R. R. Co. v. Riverside Mills, 219 U. S. 200; 31 Sup. Ct. 164; 55 L. Ed. 180; 31 L. R. A. (N. S.) 7.....	84, 473
A. C. Lumber Cor. v. Litchfield, 90 S. C. 363; 73 S. E. 182	22
Austin v. Hunter, 85 S. C. 472; 67 S. E. 734....	237, 243
Bacot v. Deas, 67 S. C. 248; 45 S. E. 171.....	427
Bailey v. Patterson, 24 S. C. Eq. (3 Rich. Eq.) 24....	239
Bardin v. Ins. Co., 82 S. C. 358; 64 S. E. 165.....	113
Beuttel v. Megone, 157 U. S. 155; 15 Sup. Ct. 566; 39 L. Ed. 655.....	281
Bibb v. Allen, 149 U. S. 481; 13 Sup. Ct. 950; 37 L. Ed. 819	162
Blohme v. Schmancke, 81 S. C. 89; 61 S. E. 1060....	169
Braffman v. Glover, 35 S. C. 436; 14 S. E. 935...406,	407
Bodie v. Ry. Co., 61 S. C. 488; 39 S. E. 715.....	130, 133
Brown v. Brown, 44 S. C. 382; 22 S. E. 412.....	409

Brownlee v. Martin, 21 S. C. 492.....	293
Bruce v. Central M. E. Ch., 147 Mich. 230; 110 N. W. 951; 10 L. R. A. (N. S.) 74; 11 Ann. Cas. 160.35,	36
Brunson v. R. R. Co., 76 S. C. 14; 56 S. E. 538; 9 L. R. A. (N. S.) 573.....	162, 480
Burnett v. Burnett, 17 S. C. 545.....	461
Buist & Co. v. Mercantile Co., 73 S. C. 48; 52 S. E. 789	379
Busby v. Ry. Co., 45 S. C. 312; 23 S. E. 50.....	290
Bussey v. Ry. Co., 78 S. C. 356; 58 S. E. 1015; Ann. Cas. 1912 A. 89.....	131
Byrd v. Boyd, 4 McC. (15 S. C. L.) 247; 15 Am. Dec. 740	226
Cable Piano Co. v. Ry. Co., 94 S. C. 143; 77 S. E. 868	496
Cain v. R. R. Co., 74 S. C. 90; 54 S. E. 244.....	379
Carolina Timber Co. v. Holden, 90 S. C. 474; 73 S. E. 470.....	461
Carrier v. Dowance, 19 S. C. 32.....	481
Center v. Ry. Co., 93 S. C. 329; 75 S. E. 952.....	497
Chapman v. Cooley, 12 Rich. (46 S. C. L.) 654.....	116
Charles v. A. C. L. R. R. Co., 78 S. C. 36; 58 S. E. 927; 125 Am. St. Rep. 762.....	82, 303
Chicago etc. R. Co. v. Arkansas, 219 U. S. 453; 31 Sup. Ct. 275; 55 L. Ed. 290.....	69
Chicago etc. Ry. Co. v. Hardwick Farmers Elevator Co., 226 U. S. 426; 33 Sup. Ct. 174; 57 L. Ed. 284	81, 88, 471
Chicago etc. Ry. Co. v. Solan, 169 U. S. 133; 18 Sup. Ct. 289; 42 L. Ed. 688.....	69, 72
Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64; 24 Sup. Ct. 64; 48 L. Ed. 96.....	382
Citizens etc. Bank v. Stackhouse, 91 S. C. 455; 74 S. E. 977; 40 L. R. A. (N. S.) 454.....	221, 222
Cochran v. Ward, 5 Ind. App. 89; 27 N. E. 795; 31 N. E. 581; 51 Am. St. Rep. 229.....	53
Coley v. Coley, 94 S. C. 383; 77 S. E. 49.....	97, 99

Commercial Trust Co. v. Grimes, 98 S. C. 220; 82 S. E. 420	218
Cromwell v. Sac Co., 94 U. S. 351; 24 L. Ed. 681....	192
Crossman v. Lurman, 192 U. S. 189; 24 Sup. Ct. 234; 48 L. Ed. 401.....	73
Cunningham v. Cunningham, 20 S. C. 317.....	18
Daughy v. R. R. Co., 92 S. C. 361; 75 S. E. 553..279,	468
Davenport v. Latimer, 53 S. C. 572; 31 S. E. 630.....	23
Deas v. Horry, 11 S. C. Eq. (2 Hill Ch.) 244.....	462
Deaver-Jeter Co. v. So. Ry. Co., 91 S. C. 503; 74 S. E. 1071	303
Dimery v. Ry. Co., 92 S. C. 169; 75 S. E. 399.....	495
Dixon v. Pendleton, 90 S. C. 12; 72 S. E. 501.....	239
Dunbar v. Ry. Co., 62 S. C. 414; 40 S. E. 884.....	456
Duncan v. Nebraska Sanitarium, 98 Neb. 162; 137 N. W. 1120; 41 L. R. A. (N. S.) 943; Ann. Cas. 1913 E. 1127.....	30
Duckett v. Butler, 67 S. C. 130; 45 S. E. 137....233,	239
Edward v. Bank, 87 S. C. 84; 68 S. E. 961.....	123
Ellen v. Ellen, 16 S. C. 132.....290,	292
Elmore v. Davis, 49 S. C. 1; 26 S. E. 898.....	177
Empire State Cattle Co. v. Ry. Co., 210 U. S. 1; 28 Sup. Ct. 607; 52 L. Ed. 931; 15 Am. & Eng. Ann. Cas. 72	281
Erie R. Co. v. N. Y., 233 U. S. 671; 34 Sup. Ct.....	203
Erskine v. Wilson, 41 S. C. 198; 19 S. E. 489.....	238
Eureka Electric Paint Co. v. Bennett, 85 S. C. 493; 67 S. E. 738.....	21
Ferguson v. Ry., 91 S. C. 61; 74 S. E. 129.....	433
Fitzgerald v. Mfg. Co., 74 S. C. 234; 54 S. E. 373....	130
Flagler v. A. C. L. Corporation, 89 S. C. 328; 71 S. E. 849.....	20, 22
Fleischman v. Ry. Co., 76 S. C. 247; 56 S. E. 974; 9 L. R. A. (N. S.) 519.....	479, 480

Fleming v. Norfolk So. Ry. Co., 160 N. C. 196; 76 S. E. 212.....	53
Foster v. Foster, 81 S. C. 301; 62 S. E. 320.....	177
Frierson, Ex parte, 96 S. C. 34; 79 S. E. 791.....	212
Fuller v. Payne, 96 S. C. 471; 81 S. E. 176.....	312
Funderburg v. Ry. Co., 81 S. C. 143; 61 S. E. 1075; 21 L. R. A. (N. S.) 868.....	208
Garrett v. Weinberg, 48 S. C. 28; 26 S. E. 3.....	292
Glavin v. R. I. Hospital, 12 R. I. 411; 43 Am. Rep. 675	28
Glover v. Burbage, 27 S. C. 308; 3 S. E. 471.....	471
Grand Trunk Ry. v. Richardson, 91 U. S. 454; 23 L. Ed. 356	51
Gray State Infirmary v. Louisville, 65 S. W. 11; 23 Ky. L. Rep. 1274; 55 L. R. A. 270.....	31
Green v. Ry. Co., 72 S. C. 402; 52 S. E. 47; 5 Ann. Cas. 165	53
Gregory v. Rhoden, 24 S. C. 99.....	410
Gulf etc. Ry. Co. v. McGinnis, 228 U. S. 173; 33 Sup. Ct. 426; 57 L. Ed. 785.....	204
Guy v. Osborne, 91 S. C. 291; 74 S. E. 617.....	239
Harvey v. Doty, 54 S. C. 382; 32 S. E. 501.....	163
Hays v. Tel. Co., 70 S. C. 16; 48 S. E. 608; 67 L. R. A. 481	304
Herlong v. So. States Lumber Co., 93 S. C. 529; 77 S. E. 219.....	441, 455
Holeman v. Fort, 3 Strob. Eq. (22 S. C. Eq.) 156....	238
Holley v. Still, 91 S. C. 487; 74 S. E. 1065.....	461
Holtzclaw v. Green, 45 S. C. 494; 23 S. E. 515.....	291
Hopkins v. Clemson Ag. College, 221 U. S. 648; 31 Sup. Ct. 658; 55 L. Ed. 890; 35 L. R. A. (N. S.) 243	41, 42
Hicks v. Sumter Mills, 39 S. C. 39; 17 S. E. 509.....	53
Hickson Lumber Co. v. Stallings, 91 S. C. 473; 74 S. E. 1072.....	19

Interstate Com. Com. v. Ala. M. Ry. Co., 168 U. S. 144; 18 Sup. Ct. 45; 42 L. Ed. 414.....	94
Interstate Com. Com. v. B. & A. Ry. Co., 145 U. S. 263; 12 Sup. St. 844; 36 L. Ed. 699.....	94
Irwin v. Williar, 110 U. S. 499, 510; 4 Sup. Ct. 499; 28 L. Ed. 225.....	162
Jennings v. Mfg. Co., 72 S. C. 421; 52 S. E. 113.....	130
Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408; 78 Atl. 898; 33 L. R. A. (N. S.) 141.....	30
Jones v. A. C. Lumber Corp., 92 S. C. 418; 75 S. E. 698	24
Jones v. Fuller, 19 S. C. 70.....	83
Jones v. Postell, 16 S. C. L. (Harper) 92.....	461
Jumper v. Bank, 39 S. C. 296; 17 S. E. 780.....	291
Kansas City So. Ry. Co. v. Carl, 227 U. S. 639; 33 Sup. Ct. 391; 57 L. Ed. 683.....	66, 80, 88
Keys v. Granite Mfg. Co., 76 S. C. 286; 56 S. E. 949	130
Kirven v. V.-C. Chem. Co., 77 S. C. 493; 58 S. E. 424; 215 U. S. 252; 30 Sup. Ct. 78; 54 L. Ed. 179.....	192
Kirkland v. Ry. Co., 93 S. C. 574; 77 S. E. 709.....	279
Knobelock v. Germania Bank, 50 S. C. 259; 27 S. E. 962	262
Latimer v. Cotton Mills Co., 66 S. C. 135; 44 S. E. 559	122
Lander v. Ware (1 Strob.) 32 S. C. L. 15.....	189
Leland v. Morrison, 92 S. C. 511; 75 S. E. 889.....	19
Lett v. St. Lawrence & O. Ry. Co., 11 Ont. App. R. 1	56, 58
Lipscomb v. Hammett, 56 S. C. 549; 35 S. E. 194.....	236
Lott v. de Graffenreid, 31 S. C. Eq. (10 Rich. Eq.) 346	410
Lott v. Thompson, 36 S. C. 38; 15 S. E. 278.....	239

Lowrimore v. Palmer Mfg. Co., 60 S. C. 153; 38 S. E. 430	130
Lowry v. Pinson, 18 S. C. L. (2 Bail.) 324.....	406
Louisville, N. A. & C. Ry. Co. v. Rush, 127 Ind. 545; 26 N. E. 1010.....	56
Louisville etc. Ry. Co. v. Motley, 219 U. S. 467; 31 Sup. Ct. 171; 55 L. Ed. 297; 34 L. R. A. (N. S.) 671	93
Lyons v. Bank, 19 Am. Rep. 191.....	482
McCarter v. Armstrong, 32 S. C. 203; 10 S. E. 953; 8 L. R. A. 625.....	401
McCown v. King, 23 S. C. 238.....	239
McCord v. R. R. Co., 76 S. C. 471; 57 S. E. 477..	479, 480
McCutcheon v. McCutcheon, 77 S. C. 129; 57 S. E. 678; 12 L. R. A. (N. S.) 1140.....	292
McDowell v. Burnett, 92 S. C. 469; 75 S. E. 873.....	318
McGunningcle v. McKee, 77 Pa. St. 81; 18 Am. Rep. 428	462
McKeown v. So. Ry. Co., 98 S. C. 338; 82 S. E. 437..	346
McLary v. Lumber Corp., 90 S. C. 153; 72 S. E. 145..	22
McLeod v. R. R. Co., 93 S. C. 71; 76 S. E. 705.....	205
McNair v. Tucker, 24 S. C. 105.....	427
Madden v. Ins. Co., 70 S. C. 295; 49 S. E. 855.....	259
Magee v. O'Neill, 19 S. C. 185; 45 Am. Rep. 765.....	38
Mayes v. Evans, 80 S. C. 362; 61 S. E. 1068.....	427
Means v. Feaster, 4 S. C. 249.....	409
Metts v. P. & A. Ins. Co., 17 S. C. 122.....	3
Meetze v. So. Express Co., 81 S. C. 379; 74 S. E. 823	469
Meyer v. R. R. Co., 92 S. C. 104; 75 S. E. 209.....	490
Middleton v. Denmark Ice & Fuel Co., 97 S. C. 457; 81 S. E. 158.....	185
Michigan Central R. R. Co. v. Vreeland, 227 U. S. 59; 33 Sup. Ct. 192.....	55, 59, 62
Miller v. Graham, 47 S. C. 294; 25 S. E. 165.....	461
Mobley v. Cureton, 2 S. C. 148.....	410

Moone v. Henderson, 4 S. C. Eq. (4 DeS.) 458.....	239
Moudon v. N. Y., N. H. & H. R. R. Co., 223 U. S. 1; 32 S. E. 169; 56 L. Ed. 327.....	385
Mo. K. & T. R. Co. v. Haber, 169 U. S. 613; 18 Sup. Ct. 488; 42 L. Ed. 878.....	73, 74
Mo. K. & T. Co. v. Harriman Bros., 227 U. S. 657; 33 Sup. St. 397; 57 L. Ed. 690.....	80, 89, 473
McC. P. R. Co. v. Larabee Flour Mills, 211 U. S. 612; 29 Sup. Ct. 214; 53 L. Ed. 352.....	69
New Eng. Natl. Bank v. Wallace, 97 S. C. 52; 80 S. E. 460	221
No. Pac. R. Co. v. Washington, 222 U. S. 370; 32 Sup. Ct. 160; 56 L. Ed. 237.....	72, 73
Oliver v. Ry. Co., 65 S. C. 26; 43 S. E. 307.....	123
Ould v. Spartanburg Realty Co., 94 S. C. 187; 77 S. E. 866	22
Parker v. N. W. University, 218 Ill.; 75 N. E. 991; 2 L. R. A. (N. S.) 556; 4 Ann. Cas. 103.....	30
Pearson, Ex parte, 79 S. C. 302; 60 S. E. 706.....	146
Peay v. Briggs, 9 S. C. L. (2 Mills) 98.....	240
Penn. R. Co. v. Goodman, 62 Pa. St. 332.....	56
Penn. R. Co. v. Hughes, 191 U. S. 477; 24 Sup. Ct. 132; 48 L. Ed. 268.....	69, 73
Pierce v. Thos. Newton, 41 Fed. 106.....	484
Pratt v. Hudson River R. R. Co., 21 N. Y. 309.....	435
Preston v. Prather, 137 U. S. 608; 11 Sup. Ct. 162....	482
Prison v. Hoffman, 72 S. E. 3.....	482
Porter v. Jeffries, 40 S. C. 92; 18 S. E. 229.....	18
Porter v. Lancaster, 91 S. C. 300; 74 S. E. 374.....	239
Poston v. Ingraham, 76 S. C. 171; 56 S. E. 780.....	410
Powers v. Mass. Homeo. Hospital, 109 Fed. 294; 47 C. C. A. 122; 65 L. R. A. 372.....	36
Reams v. Spann, 28 S. C. 530; 6 S. E. 325.....	177
Reed v. Lane, 122 Mo. 311; 26 S. W. 957.....	237

Reeves v. Cook, 71 S. C. 275; 51 S. E. 93.....	239
Reid v. Colorado, 187 U. S. 137; 23 Sup. Ct. 92; 47 L. Ed. 108.....	73, 75, 76
Rembert v. Evans, 86 S. C. 445; 68 S. E. 659.....	239
Richmond etc. Co. v. Patterson Tobacco Co., 169 U. S. 311; 18 Sup. Ct. 335; 42 L. Ed. 759.....	470
Riodan v. Doty, 50 S. C. 537; 27 S. E. 939.....	163
Roberts v. Mazeppa Mills Co., 30 Minn. 415; 15 N. W. 680	12
Roberts v. Wessinger, 69 S. C. 283; 48 S. E. 248.....	145
Rowe v. Moore, 89 S. C. 561; 72 S. E. 468.....	239
St. Louis etc. R. Co. v. Edwards, 227 U. S. 265; 33 Sup. Ct. 262; 56 L. Ed. 506.....	82, 89
St. Louis etc. R. Co. v. Hesterly, 228 U. S. 702; 33 Sup. Ct. 703; 57 L. R. A. 1031.....	203
Sanders v. Ry. Co., 90 S. C. 331; 73 S. E. 356.....	495
Sarratt v. Mfg. Co., 77 S. C. 85; 57 S. E. 616.....	184
Savage v. Jones, 225 U. S. 501; 32 Sup. Ct. 715; 56 L. Ed. 1182.....	70
Schaub v. Hannibal & St. Jos. R. Co., 106 Mo. 74; 16 S. W. 924.....	56
Sease v. Sease, 64 S. C. 216; 41 S. E. 898.....	238
Seaboard Air Line Railway v. Horton, 233 U. S. 492; 24 Sup. Ct. 635.....	337
Seaboard Air Line Railway v. Seegers, 207 U. S. 73; 28 S. E. 472; 52 L. Ed.....	472
Seegers v. S. A. L. Ry., 73 S. C. 71; 52 S. E. 797; 121 Am. St. Rep. 921; 207 U. S. 73; 28 Sup. Ct. 28; 58 L. Ed. 108.....	78, 472
Seibels v. Blackwell, 1 McM. 51.....	183
Shaw v. Robinson, 42 S. C. 345; 20 S. E. 141....	236, 239
Simpson v. Shepherd, 230 U. S. 352; 33 Sup. Ct. 729; 57 L. Ed. 1511.....	69
Sinnot v. Davenport, 22 How. 227, 243; 16 L. Ed. 243, 247	74
Smalls, Ex parte, 69 S. C. 43; 48 S. E. 400.....	212

Smith v. Alabama, 124 U. S. 465; 8 Sup. Ct. 564; 31 L. Ed. 508.....	69
Smith v. Linder, 77 S. C. 541; 58 S. E. 610.....	408
Smith v. Ry. Co., 88 S. C. 421; 70 S. E. 1057; 34 L. R. A. (N. S.) 708.....	92, 104
Smith v. Smith, McM. Eq. 134.....	410
Smyly v. Colleton Cypress Co., 95 S. C. 347; 78 S. E. 1026	113, 114, 382
Southern Ry. Co. v. Reid, 224 U. S. 436; 32 Sup. Ct. 140; 56 L. Ed. 260.....	67, 69, 72, 472
State v. Blakeley, 33 S. C. 11; 11 S. E. 637.....	135
Bowden, 92 S. C. 393; 75 S. E. 866.....	318
Browning, 70 S. C. 466; 50 S. E. 185.....	135
Butler, 21 S. C. 353.....	431
Bundy, 24 S. C. 439.....	508
Conkle, 64 S. C. 71; 42 S. E. 173.....	427
Copeland, 46 S. C. 14; 23 S. E. 980.....	476
DuRant, 87 S. C. 532; 70 S. E. 306.....	120
Gibson, 83 S. C. 34; 64 S. E. 607, 916.....	117
Green, 35 S. C. 266; 14 S. E. 610.....	152
Harmon, 79 S. C. 80; 60 S. E. 230.505, 506, 507	
Holcomb, 63 S. C. 22, 40; 40 S. E. 1017....	152
Jones, 29 S. C. 201; 7 S. E. 296.....	116
Kennedy, 85 S. C. 146; 67 S. E. 152.....	110
Mills, 79 S. C. 187; 60 S. E. 664.....	117
Mitchell, 56 S. C. 524; 35 S. E. 210....	117, 390
Nathans, 49 S. C. 199; 27 S. E. 52.....	429
Pitts, 12 S. C. 180; 32 Am. Rep. 508.....	151
Puckett, 95 S. C. 114; 78 S. E. 737; 46 L. R. A. (N. S.) 499.....	476
Quick, 49 S. C. L. (15 Rich.) 349.....	390, 391
Reynolds, 48 S. C. 384; 26 S. E. 679.....	151
Rice, 49 S. C. 418; 27 S. E. 452; 61 Am. St. Rep. 516.....	107
Richardson, 47 S. C. 116; 25 S. E. 220.....	476
Robinson, 26 S. C. 1; 1 S. E. 445.....	117
Stukes, 73 S. C. 386; 53 S. E. 643.....	116

State v. Summer, 55 S. C. 32; 32 S. E. 771; 74 Am. St. Rep. 707.....	116
Switzer, 65 S. C. 187; 43 S. E. 513.....	476
Wallace, 44 S. C. 357; 22 S. E. 411.....	116
Steamship Co. v. Rogers, 21 S. C. 27.....	147
Strauss v. Ry. Co., 94 S. C. 324; 77 S. E. 1117...131,	133
Sullivan v. Williams, 43 S. C. 489; 21 S. E. 642.....	21
Sweet v. Gilmore, 52 S. C. 530; 30 S. E. 395.....	117
Tarrant, v. Gittelson, 16 S. C. 231.....	231
Teddars v. So. Ry. Co., 97 S. C. 153; 81 S. E. 474....	344
Texas & P. R. Co. v. Abilene C. O. Co., 204 U. S. 426; 27 Sup. Ct. 350; 51 L. Ed. 553; 9 Ann. Cas. 1075	72, 86, 471
Texas etc. R. Co. v. Anderson, 61 S. W. 424.....	482
Texas etc. R. Co. v. Interstate Commerce Com., 162 U. S. 197; 16 Sup. Ct. 666; 40 L. Ed. 940.....	94
Thornton v. Franklin Square House, 200 Mass. 465; 86 N. E. 909; 22 L. R. A. (N. S.) 487.....	35
Tilley v. Hudson River R. Co., 29 N. Y. 252; 86 Am. Dec. 297.....	56, 58
Tollison v. Ry. Co., 88 S. C. 7; 70 S. E. 311.....	96
Tucker v. Ry. Co., 51 S. C. 306; 28 S. E. 943.....	291
Turner v. Foreman, 47 S. C. 31; 24 S. E. 989.....	184
University of Louisville v. Hammock, 32 Ky. L. Rep. 431; 106 S. W. 219; 14 L. R. A. (N. S.) 784....	31
Varnville Furniture Co. v. Ry. Co., 98 S. C. 63; 79 S. E. 700	471, 474
Venning v. A. C. L. R. R. Co., 78 S. C. 56; 58 S. E. 983; 12 L. R. A. (N. S.) 1217; 125 Am. St. Rep. 768	86
Virginia-Carolina Chem. Co. v. Hunter, 97 S. C. 31; 81 S. E. 190.....	407
Virginia-Carolina Chem. Co. v. Kirven, 57 S. C. 448; 35 S. E. 745.....	183
Vreeland v. Michigan Cent. R. Co., 189 Fed. 496.....	57

Wabash R. Co. v. Hayes, 234 U. S. 86; 34 Sup. Ct. 729	203
Wagner v. Sanders, 62 S. C. 89; 39 S. E. 950.....	410
Wardlaw v. S. C. R. R. Co., 45 S. C. L. (11 Rich.) 337	479
Wathen v. Louisville, 85 S. W. 1195; 27 Ky. L. Rep. 635	32
Western Union Tel. Co. v. Commercial Mill Co., 218 U. S. 406; 31 Sup. Ct. 49; 54 L. Ed. 1088; 36 L. R. A. (N. S.) 220; 21 Ann. Cases 815.....	68
Western Union Tel. Co. v. James, 162 U. S. 650; 16 Sup. Ct. 934; 40 L. Ed. 1105.....	68
Wilson v. So. Ry. Co., 93 S. C. 17; 75 S. E. 1014....	210
Winslow v. R. R. Co., 79 S. C. 344; 60 S. E. 709....	470
Witte v. Cave, 73 S. C. 17; 52 S. E. 736.....	427
Wood v. Carpenter, 101 U. S. 135; 25 L. Ed. 807....	409
Wright v. Herron, 26 S. C. Eq. (5 Rich. Eq.) 441....	461
Wright v. Willoughby, 79 S. C. 442; 60 S. E. 971....	19
Yazoo etc. Ry. Co. v. Greenwood Grocery Co., 227 U. S. 1; 33 Sup. Ct. 213; 57 L. Ed. 389.....	67
Youngblood v. Ry. Co., 60 S. C. 9; 38 S. E. 232; 85 Am. St. Rep. 824.....	133

Statutes Cited by the Court.

CONSTITUTION OF 1895.

Art. I, Sec. 15.....	110
17.....	135
V. 26.....	297, 299
29.....	297

CRIMINAL CODE OF 1912.

Sec. 94.....	150
95.....	150
98.....	150
100.....	429
208.....	295

CODE OF CIVIL PROCEDURE 1912.

Sec. 8.....	151
11 s. d. 2.....	6
11 s. d. 1.....	174
86.....	180
88.....	151
123.....	176
174.....	6, 7
176.....	174
183.....	174
218.....	161
219.....	147
238.....	181
257.....	174
314.....	144
407.....	151

CIVIL CODE 1912

Sec. 722.....	298
1397.....	429

Sec. 1486	416
1527	416
1528	416
2516	160
2572	469
2573	63, 64
3421	161
3425	166
3562	458, 459, 460
3812	418
3955-58	202
3962	217
4230	415, 416, 417

STATUTES AT LARGE.

24 Stats. 81.....	87
26 Stats. 719.....	87, 469

FEDERAL STATUTES.

U. S. Revised Statutes, sec. 5258.....	73
24 U. S. Statutes at Large, p. 379.....	89
24 U. S. Statutes at Large, p. 387.....	93
23 U. S. Statutes at Large 31, Animal Industry Act..	73
27 U. S. Statutes at Large 531, Safety Appliance Act,	133, 319, 336
34 U. S. Statutes at Large 769, Pure Food Act.....	70
35 U. S. Statutes at Large, Employers' Liability Act,	52, 133, 203, 319, 336, 338, 349, 351, 378, 385
Carmack Amendment to Interstate Rate Act.....	63, 64, 66, 68, 77, 83, 88, 468 469

RULES OF COURT.

Circuit Court Rule 14.....	146
28	212
31	182
59	181, 182
Supreme Court Rule 5	196

INDEX.

ACCOUNTS.

1. As plaintiff, in an action on an account stated, need not prove all of the items, as he must in case of an open account, and may, under Civ. Code 1912, sec. 2516, recover interest, a third cause of action on account stated, joined with two previous causes of action which stated practically the same facts, but sought recovery on an open account, will not be stricken as redundant. *Gwathney v. Burgiss*, 82 S. E. 394, 98 S. C. 152.

ACTIONS.

1. Under Code Civ. Proc. 1912, sec. 218, authorizing the joinder in the same complaint of several causes of action upon contract, an action on open account may be joined with an action on account stated. *Gwathney v. Burgiss*, 82 S. E. 394, 98 S. C. 152.

ADVERSE POSSESSION.

1. Though a person enters rightfully into possession, he may change the nature of his possession by disclaiming the title and giving proper notice thereof, or he may enter as a trespasser in the first instance and acquire title by adverse possession. *Mitchell v. Hamilton*, 82 S. E. 426, 98 S. C. 289.
2. It is only necessary to hold adverse possession for 10 years to acquire title, but it is otherwise where the person entering into possession relies on the presumption of a grant, in which case the adverse possession must continue for 20 years. *Mitchell v. Hamilton*, 82 S. E. 426, 98 S. C. 289.
3. Adverse possession is no defense to a suit to set aside alleged fraudulent conveyances. *Tucker*

v. Weathersbee, 82 S. E. 638, 98 S. C. 402.

AFFIDAVITS.

See Criminal Law. State v. Barnett, 82 S. E. 795, 98 S. C. 422.

AGREEMENT OF ATTORNEYS.

1. Agreement that case should be marked "heard" and referred to a referee to hear and report the testimony, held presumed to have been noted by the presiding Judge, as required by Circuit Court rule 14, where nothing appeared to the contrary. *Lummas Cotton Gin Co. v. Counts*, 82 S. E. 391, 98 S. C. 136.

APPEAL AND ERROR.

See Criminal Law.

1. Where the venue in claim and delivery of certain cattle was laid in C., and was charged to M., an order directing the sheriff of M. to seize and immediately deliver the cattle was not an order involving the merits, and could not be made the basis of an appeal under Code Civ. Proc. 1912, sec. 11, par. 1. *Easterling v. Odom*, 82 S. E. 407, 98 S. C. 171.
2. Where on appeal a judgment of a magistrate was reversed and new trial ordered for error in the findings of fact, the order of the Circuit Court is not appealable. *Wray v. Atlantic Coast Line R. Co.*, 82 S. E. 412, 98 S. C. 278.
3. In an action against a corporation and its agent, where the jury found against the corporation alone, an order granting plaintiff a new trial as against the agent is not appealable, because if the Supreme Court should decide there was no error

- in granting the new trial, it could not render judgment absolute upon the right of the agent. *Nunnamaker v. Smith's*, 82 S. E. 675, 98 S. C. 466.
4. Where a trial Judge not being satisfied with the proof as to the damages, granted a new trial, the order was not appealable; the actual damages not having been determined so as to enable the Supreme Court to give judgment absolute. *Lott v. Southern Ry. Co.*, 82 S. E. 795, 98 S. C. 170.
 5. An exception to the denial of a new trial will be overruled, where the record does not disclose the grounds of the motion and where the exception was not argued. *Mitchell v. Hamilton*, 82 S. E. 425, 98 S. C. 289.
 6. An order vacating the part of an order, which directs in advance who shall pay the costs of appeal from a judgment, does not affect any substantial rights of appellant and is not appealable. *Greer v. Keaton*, 82 S. E. 424, 98 S. C. 192.
 7. A party cannot on appeal take advantage of error in the admission of evidence, where no ruling was made on his objection. *Wilson v. Southern Ry. Co.*, 82 S. E. 481, 98 S. C. 209.
 8. Error cannot be predicated on portions of the charge where, when they are considered in connection with the entire charge, there is no reasonable ground for supposing the result would have been different had they not been given. *Thornton v. Spartan Mills*, 82 S. E. 414, 98 S. C. 262.
 - 8½. The admission of an alleged confession, over objection as not free and voluntary, substantially the same as other statements of defendant admitted without objection, and tending to corroborate statements of defendant in Court, as to the cause leading to the commission of the homicide, is not prejudicial to defendant, and will not be reviewed on appeal. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.
 9. An order permitting an amendment to substitute a third party as defendant instead of the original defendant, is in effect a dismissal of the action against the original defendant, and not prejudicial to its rights, and an appeal by the original defendant will not lie from such order, except as to costs. *Hambricht v. So. Ry.—Ca. Div.*, 82 S. E. 416, 98 S. C. 219.
 10. An exception to the denial of a motion for nonsuit will not be considered, where the exception fails to state the grounds of the motion. *Mitchell v. Hamilton*, 82 S. E. 425, 98 S. C. 289.
 11. An order of the Circuit Judge requiring the printing of unnecessary evidence and imposing unnecessary expense on appeal is appealable, and the appeal will be heard with the exceptions when the case is heard on the merits. *Greer v. Keaton*, 82 S. E. 424, 98 S. C. 192.
 12. Where the attorneys cannot agree on the case for appeal, the case must be settled by the trial Court, and appellant must prepare the case as fixed for him, and where he is dissatisfied with the ruling of the Court he must except and question the correctness thereof when the case is heard on the merits. *Greer v. Keaton*, 82 S. E. 424, 98 S. C. 192.
 13. Where a charge of contempt against a member of the bar involves his professional conduct, and charges a lack of respect on his part for constituted authority, the Court on appeal will review the charges, which are not speculative, although the sentence for contempt may have been served by the attorney charged. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
 14. The rule governing preparation of the case on appeal, restated, and the bar warned that cases not prepared in accordance with the rule, are not entitled to consideration. *Twigg*

- v. *Williams*, 82 S. E. 676, 98 S. C. 431.
15. Where counsel cannot agree upon a correct synopsis of the evidence, if the matter be submitted to the Circuit Judge, his decision on that point is subject to appeal. *Twiggs v. Williams*, 82 S. E. 676, 98 S. C. 431.
 16. Unless the printed case containing the proceedings at trial be prepared in accordance with the rules, and immaterial matters be omitted, the Supreme Court will be justified in dismissing the appeal. *Twiggs v. Williams*, 82 S. E. 676, 98 S. C. 431.
 17. In preparing the printed case for appeal, testimony should be set out in narrative form, without repetition, save when the questions and answers are necessary to elucidate the point to be decided, or it is desired to call attention to the exact language of the witness. *Twiggs v. Williams*, 82 S. E. 676, 98 S. C. 431.
 18. In preparing the printed case, only the substance of instruments in writing should be set out, unless a construction is desired, and, where a construction is necessary, only the part pertinent need be set out in full; the remainder being stated. *Twiggs v. Williams*, 82 S. E. 676, 98 S. C. 431.
 19. Where counsel cannot agree upon a correct synopsis of the evidence, the matter should be submitted to the Circuit Judge. *Twiggs v. Williams*, 82 S. E. 676, 98 S. C. 431.
 20. Where a party desiring that certain issues be submitted to a jury, on appeal to the Circuit Court, fails to comply with Circuit Court rule 28 as to notice, his exceptions to the Court's failure to submit such issues to a jury will be overruled. *In re Williams' Estate*, 82 S. E. 402, 98 S. C. 211.
 21. Agreement that case should be marked "heard" and referred to a referee to hear and report the testimony, *held* presumed to have been noted by the presiding Judge, as required by Circuit Court rule 14, where nothing appeared to the contrary. *Lummas Cotton Gin Co. v. Counts*, 82 S. E. 391, 98 S. C. 186.
 22. A trial Court's discretion in matters pertaining to the trial of causes, including the hours of the sessions of the Court and the granting or refusing of continuances, within or beyond the term, will not be interfered with unless clearly abused. *Lummas Cotton Gin Co. v. Counts*, 82 S. E. 391, 98 S. C. 186.
 23. In an action on an accident policy which the insurer claimed was void because the insured had other insurance in force, *held* that a verdict for plaintiff would not be disturbed on appeal, where the evidence on the question of waiver by the insurer's agent was conflicting. *Wylie v. United States Health and Accident Ins. Co.*, 82 S. E. 402, 98 S. C. 278.
 24. To hold refusal of defendant's request for a view by the jury of the premises where plaintiff was injured by machinery to be error, the appellate Court must be satisfied that the refusal was an abuse of discretion. *Thorn-ton v. Spartan Mills*, 82 S. E. 414, 98 S. C. 262.
 25. A defense not argued on appeal must be considered abandoned. *Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244.
 26. Exceptions not argued will be deemed abandoned. *Ex parte Coleman*, 82 S. E. 674, 98 S. C. 420.
 27. The appellate Court can review only that portion of an order of the Circuit Court reversing and remanding a judgment of a magistrate which is appealed from. *Daly v. Jefferson Hotel Co.*, 82 S. E. 412, 98 S. C. 222.
 28. It is not proper for the magistrate, on appeal from a conviction before him, to appear in the Circuit Court and argue in

- support of his judgment. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
29. Refusal of a magistrate to accept an appeal bond and stay proceedings on appeal from a judgment for contempt is error. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
30. Findings of facts by the probate Court concurred in by the Circuit Court as to the person who should administer upon an estate will not be disturbed on appeal. *In re Est. Williams*, 82 S. E. 402, 98 S. C. 211.
31. A party complaining on appeal of the findings of fact, on the ground of the insufficiency of the testimony to support them, must show a preponderance of the testimony that the findings are erroneous. *Minshew v. A. C. L. Corporation*, 81 S. E. 1027, 98 S. C. 8.
32. An exception to the admission of irrelevant and incompetent testimony will be overruled unless appellant satisfies the Court that there was prejudicial error. *Greer v. Keaton*, 82 S. E. 424, 98 S. C. 192.
33. Exclusion of testimony of a sister of defendant as to her ill treatment by deceased prior to the homicide, tending to show cause for ill will by defendant toward deceased, held not prejudicial to defendant on his trial for murder. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.
34. Alleged errors not presented to the trial Court in the motion for new trial will not be considered on appeal. *Crawford v. Rice & Hutchins Baltimore Co.*, 82 S. E. 273, 98 S. C. 121.
35. The admission or exclusion of evidence on the ground of relevancy or irrelevancy is a matter within the sound discretion of the trial Court, whose judgment will not be reviewed unless unreasonably exercised or abused. *Crawford v. Rice & Hutchins Baltimore Co.*, 82 S. E. 273, 98 S. C. 121.
36. Where a complaint alleged that plaintiff served defendant from March 1st to August 1st, and the answer charged that the relations between the parties terminated about August 1st, defendant was not prejudiced by a statement in argument that defendant discontinued plaintiff's services the latter part of July, 1912. *Crawford v. Rice & Hutchins Baltimore Co.*, 82 S. E. 273, 98 S. C. 121.
37. Under Code Civ. Proc. 1912, sec. 11, subd. 2, the Supreme Court, on appeal from an order granting new trial and setting aside verdict directed for plaintiff, if no error was committed in granting the new trial, must render judgment dismissing the complaint. *Planters Oil Co. v. Lightsey*, 81 S. E. 1102, 98 S. C. 8.
38. Where complainant was not entitled to specific performance, error could not be based on failure to retain the bill for the assessment of damages for breach of contract, in the absence of a request therefor. *Elliott v. Page*, 82 S. E. 620, 98 S. C. 400.
39. Under Cr. Code 1912, secs. 94, 95, 98, on appeal from magistrate's Court, affidavits as to the testimony submitted by accused, held not part of the proceedings upon which the appeal was to be heard, and the Court properly refused to consider them. *State v. Richardson*, 82 S. E. 353, 98 S. C. 147.
40. Code Civ. Proc. 1912, sec. 407, relative to determining alleged errors of fact on appeals to the Circuit Court from inferior Court on affidavits or testimony, does not apply to criminal cases in view of section 8. *State v. Richardson*, 82 S. E. 353, 98 S. C. 147.
41. The Supreme Court should not, in its opinion, upon reversing and remanding for a new trial, unnecessarily make a statement of the facts and their consequences, so as to raise or suggest questions which the parties have not raised at trial. *Gregory-Conder Mule Co. v.*

- Roddey*, 78 S. E. 876, 98 S. C. 847.
42. In an action against a carrier for refusal to accept plaintiff's ticket for transportation, he being entitled to a peremptory charge that the ticket was good, the carrier was not prejudiced by an instruction that defendant's agents could waive a limitation stipulation in the contract and submitting to the jury whether they had done so. *Eberle v. Southern Ry. Co.*, 79 S. E. 798, 98 S. C. 89.
43. Where the Court gave the requests of defendant, he cannot complain of the error therein. *Bennett v. Southern Ry.—Carolina Division*, 79 S. E. 710, 98 S. C. 42.
44. Where there is sufficient testimony to support the verdict, the allowance of a new trial is discretionary with the trial Court. *Bennett v. Southern Ry.—Carolina Division*, 79 S. E. 710, 98 S. C. 42.
45. Though the probate Judge, in his decree, stated that a jurisdictional question had been abandoned by a party subsequently appealing to the Circuit Court, where the Circuit Judge passed upon the question, it will be presumed that the question was properly before him. *Beach v. Addison*, 82 S. E. 428, 98 S. C. 215.
46. An exception to the admission of irrelevant and incompetent testimony will be overruled, unless appellant satisfies the Court that there was prejudicial error. *Mitchell v. Hamilton*, 82 S. E. 425, 98 S. C. 289.
47. In an action for the wrongful death of a husband and father, where there was no evidence that he contributed to the support of a married daughter, the giving of an instruction on the right of children who had reached their majority to expect assistance in case of sickness, etc., held harmless, if erroneous. *Thornon v. Seaboard Air Line Ry.*, 82 S. E. 438, 98 S. C. 348.
48. An exception to the denial of a new trial will be overruled, where the record does not disclose the grounds of the motion and where the exception was not argued. *Mitchell v. Hamilton*, 82 S. E. 425, 98 S. C. 289.
49. A majority of the Court concurring in the opinion, though not in the reasons why, a new trial should be granted, it is so adjudged. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.

ARGUMENT OF COUNSEL.

1. Misconduct of counsel in argument to the jury is not available for error unless the Court is asked to rule thereon and to instruct the jury to disregard the same. *Crawford v. Rice & Hutchins Baltimore Co.*, 82 S. E. 273, 98 S. C. 121.
2. Argument of counsel on testimony that had been stricken was not error, where the argument was immediately terminated as soon as counsel's attention was called to the fact that the testimony had been stricken. *Crawford v. Rice & Hutchins Baltimore Co.*, 82 S. E. 273, 98 S. C. 121.
3. Where a complaint alleged that plaintiff served defendant from March 1st to August 1st, and the answer charged that the relations between the parties terminated about August 1st, defendant was not prejudiced by a statement in argument that defendant discontinued plaintiff's services the latter part of July, 1912. *Crawford v. Rice & Hutchins Baltimore Co.*, 82 S. E. 273, 98 S. C. 121.
4. The Court must enforce rule 59, relating to the right to open and close, and the burden is on the successful party wrongfully permitted to close the argument to show waiver of the right by the defeated party. *Barnett v. Gottlieb*, 82 S. E. 406, 98 S. C. 180.

ATTORNEYS AT LAW.

1. An attorney, prosecuted before a magistrate, held guilty of con-

- tempt in charging, in a motion for change of venue, the magistrate with directing his constable to influence a juror against him, and with being instigated by malice and improper motives in his rulings. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
2. Advice of counsel with reference to contract. *Minshe v. A. C. L. Corp.*, 81 S. E. 1027, 98 S. C. 8.
 3. Agreements of attorneys, with reference to trial. *Lummus Cotton Gin Co. v. Counts*, 82 S. E. 391, 98 S. C. 186.
 4. It not appearing what contract existed between an attorney and client for the former's compensation, and it appearing that the attorney had attended to other matters for the client, and when called upon for money collected, stated that the client was indebted to him for professional services to an amount as great as that which he had collected, and that as soon as he had collected the entire claim, he paid it to a third party for the client, and so notified the latter, a verdict of not guilty should have been directed on the charge against the attorney of breach of trust with fraudulent intent. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
 5. Where a charge of contempt against a member of the bar involves his professional conduct, and charges a lack of respect on his part for constituted authority, the Court on appeal will review the charges, which are not speculative, although the sentence for contempt may have been served by the attorney charged. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.

ASSAULT AND BATTERY.

1. In a prosecution for assault and battery with intent to kill, where defendant testified in his own behalf, questions on cross-examination as to whether he had been in similar difficulties before, and had cut a certain named person, did not tend to

impeach his credibility, as distinguished from his general moral character, and hence were inadmissible. *State v. Knox*, 82 S. E. 278, 98 S. C. 114.

2. Under an indictment charging assault and battery with intent to kill, a jury can find the defendant guilty of an assault and battery. *State v. Knox*, 82 S. E. 278, 98 S. C. 114.
3. Evidence, in a prosecution for assault and battery with intent to kill, where defendant attempted to show that he acted in self-defense, held to require the submission of simple assault and battery. *State v. Knox*, 82 S. E. 278, 98 S. C. 114.
4. It is not error to refuse to submit the question of assault and battery under an indictment for assault and battery with intent to kill, unless there is testimony to show that defendant is only guilty of assault and battery. *State v. Knox*, 82 S. E. 278, 98 S. C. 114.
5. The opinion of a magistrate as to whether or not a person committing an assault has been sufficiently punished for the criminal offense is incompetent on the trial of civil action to recover damages for the assault. *Barnett v. Gottlieb*, 82 S. E. 406, 98 S. C. 180.

ASSIGNMENTS.

1. Petitioner acquired subsequent to a judgment and decree for sale, and prior to sale, an assignment of his assignor's undivided one-third interest in net proceeds of sale of lands (after payment of amount due on a mortgage thereon) ordered to be sold at judicial sale. The assignor then bid in the property at such sale, and failed to comply with her bid. Thereupon the property was ordered under a supplementary order to be resold at said assignor's risk as bidder. Held, petitioner's assignor, though entitled to one-third the net balance of the resale of property after the mortgage shall have been paid,

could not, before such resale, demand that any certain part of the proceeds be paid to her. *Ex parte Holman*, 81 S. E. 518, 98 S. C. 97.

2. So, petitioner's assignor not being entitled to demand such payment, neither could petitioner, the assignee. *Ib.*

ASSUMPTION OF RISKS.

1. Under the Constitution, the defense of assumption of risk is not available to a railroad company when sued by an employee for a personal injury. *Sturdyvin v. A. & C. A. L. R. R. Co.*, 82 S. E. 275, 98 S. C. 125.
2. A charge that an employee, in an action under the Federal Employers' Liability law, does not assume risks of injury brought about by the negligence of the employer in the performance of his nondelegable and nonassignable duties sustained. *Thornton v. S. A. L. Ry.*, 82 S. E. 433, 98 S. C. 348.
3. An incidental remark in connection with charge on assumption of risks, "that does not mean the person assumes the risks of negligence," cannot reasonably be supposed to have affected the verdict, where the law with reference to that defense was fully covered in the general charge, and special instructions given on request of appellant. *Thornton v. Spartan Mills*, 82 S. E. 414, 98 S. C. 262.
4. The trial Judge having charged at appellant's request "this action is to be determined by the provisions of the Employers' Liability Act of Congress, which supersedes all State regulations of the subject. * * * Whatever in the Constitution of South Carolina militates against the defense of assumption of risks, is superseded by the Employers' Liability Act of Congress," an exception to his failure to charge that "the specific acts of negligence charged in the complaint not being breaches of any Federal statutes enacted for the safety of employees, the defense

of assumption of risks, as at common law, is open to the defendant, unaffected by any constitutional or statutory enactment of South Carolina," cannot be sustained. *Bramlett v. So. Ry. Co.*, 82 S. E. 501, 98 S. C. 319.

ATTACHMENTS.

1. Where plaintiff, in an action to recover a debt from defendant, attaches money in the hands of a trust company, defendant, claiming that the money belonged to a bank, has no standing to move to dissolve the attachment. *Union Buffalo Mills v. Thesmar*, 81 S. E. 181, 98 S. C. 1.

BAILMENTS.

See Warehousemen. Carolina Rice Co. v. West Point Mills Co., 82 S. E. 679, 98 S. C. 476.

BILLS AND NOTES.

1. A *bona fide* holder of a negotiable note before maturity for a valuable consideration without notice holds the title unaffected by any fact impeaching the validity of the note as between the original parties thereto. *Commerce Trust Co. v. Grimes*, 82 S. E. 420, 98 S. C. 220; *Central Natl. Bk. v. Grimes*, 82 S. E. 420, 98 S. C. 418.

BREACH OF TRUST WITH FRAUDULENT INTENT.

1. Evidence on prosecution of an attorney employed, among other matters, to collect a claim, who after collecting a part thereof refused, on demand, to pay it over, claiming his client owed him more than that for professional services, is insufficient to show fraudulent intent. *State v. Barnett*, 82 S. E. 795, 98 S. E. 422.

BROKERS.

See Gaming.

1. Where defendant failed to furnish cotton brokers with whom he had transactions with suffi-

cient funds to indemnify themselves on purchases and sales made for his benefit, the brokers were not bound to carry his contracts to maturity; it being the duty of the principal to indemnify his agent. *Gwathney v. Burgiss*, 82 S. E. 394, 98 S. C. 152.

2. Commissions on sale of real estate within a limited period. *Keenan v. Matthews*, 82 S. E. 481, 98 S. C. 226.

BURGLARY.

1. Under Const., art. I, sec. 17, providing that no person shall be twice put in jeopardy for the same offense, accused, having been acquitted of the offense of breaking and entering another's premises in the nighttime, with intent to steal, cannot thereafter be put on trial and convicted on account of the same entry for the offense of entering without breaking, with intent to steal. *State v. Mitchell*, 82 S. E. 676, 98 S. C. 474.

CANCELLATION OF INSTRUMENTS.

1. A vendor of standing timber may sue for a forfeiture of the conveyance based on the failure of the purchaser and his assignee to begin to cut and remove timber within a reasonable time, without first giving notice to the purchaser or assignee to begin to remove the timber pursuant to the conveyance silent as to the time when the cutting and removal should begin. *Minshew v. A. C. L. Corp.*, 81 S. E. 1027, 98 S. C. 8.

CARMACK AMENDMENT.

1. Construed in. *DuPre v. C., N. & L. R. R. Co.*, 79 S. E. 310, 98 S. C. 468; *Varnville v. C. & W. C. Ry. Co.*, 79 S. E. 700, 98 S. C. 63.

CARRIERS OF GOODS.

1. Civ. Code 1912, section 2578, providing a penalty for car-

rier's failure to promptly adjust claims, held constitutional. *Varnville Furniture Co. v. Charleston & W. C. Ry. Co.*, 79 S. E. 700, 98 S. C. 68.

2. Where, in an action for loss on freight and penalty for nonpayment within 40 days, it appeared that plaintiffs had received and retained an order in lieu of money without objection until after the penalty had accrued, they were estopped to claim the penalty. *W. J. Andrews & Son v. Atlantic Coast Line R. Co.*, 82 S. E. 408, 98 S. C. 212.
3. In an action against a carrier for loss on freight and a penalty for nonpayment within 40 days, evidence of defendant's dealings with other claimants was properly excluded. *W. J. Andrews & Son v. Atlantic Coast Line R. Co.*, 82 S. E. 408, 98 S. C. 212.
4. But it was error to exclude evidence of former dealings between the parties. *Ib.*
5. Acts of a carrier in indorsing its freight bill with a notation of loss and in replying to the shipper's claim a year afterwards that on a reduction to invoice figures it would pay, held a waiver of a provision that claim for loss should be made within four months. *Sauls-Baker Co. v. Atlantic Coast Line R. Co.*, 82 S. E. 418, 98 S. C. 300.
6. The Carmack Amendment, June 29, 1906, c. 3591, sec. 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1911, p. 1307), to the Interstate Commerce Act, February 4, 1887, c. 104, sec. 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), imposing a liability for damage to goods shipped upon the initial carrier, and providing that it shall not deprive the owner of any right which he had under the existing law, does not deprive a consignee of his right to a penalty for failure of the terminal carrier to pay damages to the shipment or to inform the consignee of which carrier caused

the damage, given by act February 15, 1910 (26 Stat. at Large, p. 717, Civ. Code 1912, sec. 2572), since the two statutes refer to the liability of different carriers. *DuPre v. C., N. & L. R. R. Co.*, 79 S. E. 810, 98 S. C. 468.

CARRIERS OF PASSENGERS.

1. Where a carrier's ticket agent sold plaintiffs certain mileage books on representation that they might be used over a specified route, which was untrue, and plaintiffs were damaged thereby, the carrier was liable for the damages, though the plaintiffs by examination of the book and tariffs might have ascertained the contrary. *Driggs v. Southern Ry. Co.—Carolina Division*, 81 S. E. 431, 98 S. C. 100.
2. Where a carrier sold a mileage contract to plaintiff under schedules imposing no limit on the use of tickets issued in exchange for coupons, it could not, by filing subsequent schedules containing such limitation, alter plaintiff's contract so as to make a ticket issued to him on his mileage coupons subject to such limitation. *Eberle v. Southern Ry. Co.*, 79 S. E. 793, 98 S. C. 89.
3. A ticket was good on the train on which it was presented, where it contained the single limitation that it was not good on a named train; that not being then the official or advertised name of the train, though it had formerly been its advertised name. *McKeown v. Southern Ry. Co.*, 82 S. E. 437, 98 S. C. 338.
4. A conductor, claiming the ticket presented by a passenger was not good, was charged with the information which an investigation that he might have made, by communication with the ticket seller, would have furnished, as regards the carrier's right to eject the passenger. *Id.*
5. A passenger is not required to minimize, by paying cash fare, damages from an anticipated wrong of ejection, when the ticket presented by him is good, but is claimed by the conductor to be bad. *McKeown v. Southern Ry. Co.*, 82 S. E. 437, 98 S. C. 338.
6. Want of wilfulness of the ticket agent in issuing to a passenger a ticket containing a limitation which led the conductor to believe it was not good on that train cannot negative the wilfulness of the conductor in ejecting the passenger without investigation of his reasonable explanation. *McKeown v. Southern Ry. Co.*, 82 S. E. 437, 98 S. C. 338.
7. Where a dispute arises as to right to ride on the ticket presented, the conductor not having heeded the explanations given, or investigated them, but ejected the passenger, the reasonableness of the explanations is for the jury. *McKeown v. Southern Ry. Co.*, 82 S. E. 437, 98 S. C. 338.
8. A street railroad company has a right to make and enforce reasonable rules. *Taylor v. Spartanburg Ry., Gas & Electric Co.*, 82 S. E. 404, 98 S. C. 206.
9. A rule of a street car company requiring a person holding a transfer to take the next succeeding car at the point designated on the transfer, held a reasonable protection against fraud. *Taylor v. Spartanburg Ry., Gas & Electric Co.*, 82 S. E. 404, 98 S. C. 206.
10. A street car company whose regulations require a person holding a transfer to take the next succeeding car at the point designated was justified in refusing transfers of passengers boarding the car 100 yards from such point, and, on their refusal to pay fare, in ejecting them. *Taylor v. Spartanburg Ry., Gas & Electric Co.*, 82 S. E. 404, 98 S. C. 206.

CHARGE TO JURY.

1. Statement in charge that proof of injury to a servant by defective machinery was *prima facie* evidence of negligence on the part of the master, *held* not error in view of the remainder of the charge. *Bennett v. Southern Ry.—Carolina Division*, 79 S. E. 710, 98 S. C. 42.
2. The charge in an action for the wrongful death of a servant, *held* not objectionable as one on the facts when considered as a whole. *Id.*, 79 S. E. 710, 98 S. C. 42.
3. In an action for the wrongful death of a servant, a requested charge, assuming that he was not killed in a certain manner, was properly refused where the evidence raised conflicting inferences. *Thornton v. Seaboard Air Line Ry.*, 82 S. E. 438, 98 S. C. 848.
4. An instruction stating the law applicable if certain facts be found is not a charge on the facts. *McKeown v. Southern Ry. Co.*, 82 S. E. 437, 98 S. C. 338.
5. In an action for the wrongful death of a father, where a charge was requested that, in determining the probable duration of contributions to children, one of whom was married, and the other of whom was a boy 14 years of age, it must be considered that there was no legal responsibility resting on the father to support children who have arrived at the age of 21 years, it was not error to add that if those should be found to be the facts, they should be considered. *Thornton v. Seaboard Air Line Ry.*, 82 S. E. 438, 98 S. C. 848.
6. Where the Court, in an action for the wrongful death of a husband and father, charged that the law only intended to reimburse the family dependent upon the husband, a charge that it made no difference how much the deceased was earning, the question being how much did he contribute for the support of his family, if erroneous, was harmless. *Thornton v. Seaboard Air Line Ry.*, 82 S. E. 438, 98 S. C. 848.
7. Where the Court charged that the Federal Employers' Liability Act governed the case, and that assumed risk was not a defense to it, other remarks on the law of assumed risk were not erroneous as eliminating such defense whether the injury was caused by a defect in violation of the Federal act or not. *Bramlett v. Southern Ry. Co.*, 82 S. E. 501, 98 S. C. 819.
8. The modification of an instruction that each circumstance relied upon by the State must be proved to the satisfaction of the jury to a moral certainty or beyond a reasonable doubt or disregarded, by adding that the force of all circumstances were with the jury, *held* not erroneous. *State v. Griffin*, 82 S. E. 254, 98 S. C. 105.
10. Ordinarily it is not permissible to instruct the jury that the testimony has a particular "drift." *State v. Riley*, 82 S. E. 621, 98 S. C. 386.
11. Error cannot be predicated on portions of the charge, where, when they are considered in connection with the entire charge, there is no reasonable ground for supposing the result would have been different had they not been given. *Thornton v. Spartan Mills*, 82 S. E. 414, 98 S. C. 262.
12. Instruction that owner of warehouse, flooded by storm, was not liable for the consequences of a storm occurring only twice in a generation, *held* improper as a charge on the facts. *Carolina Rice Co. v. West Point Mill Co.*, 82 S. E. 679, 98 S. C. 476.
13. Instruction that a warehouseman, if a gratuitous bailee, "would only be liable for gross negligence, that would be for a conscious failure to use due care," *held* not erroneous, in the

absence of any request to the Court to differentiate between gross negligence and a conscious failure to observe due care. *Carolina Rice Co. v. West Point Mill Co.*, 82 S. E. 679, 98 S. C. 476.

14. In an action for the wrongful death of a husband and father, where there was no evidence that he contributed to the support of a married daughter, the giving of an instruction on the right of children who had reached their majority to expect assistance in case of sickness, etc., held harmless, if erroneous. *Thornton v. Seaboard Air Line Ry.*, 82 S. E. 433, 98 S. C. 348.

15. Under Const., art. v, sec. 26, declaring that Judges shall not charge as to matters of fact, it is improper to charge that the defense of alibi should be received with caution. *State v. Smalls*, 82 S. E. 421, 98 S. C. 297.

16. Where defendant indicted for murder attempted to show that he had been moved to take the life of deceased because of an outrage committed against his sister, and counsel argued the right of a brother to slay his sister's seducer, a charge that: "This Court has jurisdiction of every crime and offense committed in this State. No one has a right to appeal to any other tribunal, and if a man pleads the higher law he is guilty of murder. I won't say if he pleads it he is guilty of murder, but he has no right to say he took the law into his own hands. The higher law has not any force in South Carolina." Held, by a majority of the Court, not error. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.

17. On a trial for murder, the jury should be fully instructed as to its power (in effect) to fix the penalty by finding, or omitting to find, a recommendation to mercy, in case the defendant is guilty of murder. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.

See Assault and Battery. State v. Knox, 82 S. E. 278, 98 S. C. 114.

CHARITIES.

1. A devise of the balance of testatrix's estate to be used for keeping up certain graves at F. church, and also as an endowment fund for the benefit of such church, held operative as a charitable use. *Drennan v. Agurs*, 82 S. E. 622, 98 S. C. 391.

2. An eleemosynary corporation conducting a hospital for the care of the sick, some of whom are cared for freely, and others of whom pay fees for such care, more or less in accordance with their circumstances; all funds so received being devoted, along with gifts and bequests, to the maintenance, support, improvement and equipment of the hospital, is a public charity; and is not responsible to a patient for injuries resulting from the negligence of its servants selected with due care. *Lindler v. Columbia Hospital*, 81 S. E. 512, 98 S. C. 25.

CHEQUES.

1. In a prosecution for drawing and uttering a check without funds to meet it, evidence that the check was antedated was admissible, since the giving of such a check was not within the statute. *State v. Winter*, 82 S. E. 419, 98 S. C. 294.

CLAIM AND DELIVERY.

1. In an action to recover possession of two cows, defendant's previous execution of a mortgage thereon, held merely evidence that she claimed title, and insufficient by itself to defeat the action. *Rogers v. Felder*, 82 S. E. 436, 98 S. C. 178.

2. An interlocutory administrative order directing a sheriff of one county to seize and take cattle in another county, under the provisions of the Code of Civil Procedure (sec. 259), does not involve the merits, and is not

appealable. *Easterling v. Odom*, 82 S. E. 407, 98 S. C. 171.

3. A judgment in claim and delivery, in which the right to damages for an excessive levy under a distress warrant was not litigated, was not *res judicata* as to such damages in an action for excessive distress, though the question might have been litigated in the first action. *Canon v. Cox*, 82 S. E. 399, 98 S. C. 185.

CONSTITUTIONAL LAW.

1. Civ. Code 1912, sec. 2578, providing a penalty for carrier's failure to promptly adjust claims, *held* not to deny carriers the equal protection of the laws. *Varnville Furniture Co. v. Charleston & W. C. Ry. Co.*, 79 S. E. 700, 98 S. C. 63.
2. Civ. Code 1912, sec. 2578, providing a penalty for carrier's failure to promptly adjust claims, *held* not to deprive carriers of their property without due process of law. *Varnville Furniture Co. v. Charleston & W. C. Ry. Co.*, 79 S. E. 700, 98 S. C. 63.

CONTEMPT.

1. An attorney, prosecuted before a magistrate, *held* guilty of contempt in charging, in a motion for change of venue, the magistrate with directing his constable to influence a juror against him, and with being instigated by malice and improper motives in his rulings. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
2. Under Civ. Code 1912, sec. 1897, a magistrate exceeded his authority in sentencing to 24 hours imprisonment for contempt. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
3. On appeal from a magistrate the Circuit Court should not, on the ground that the questions are speculative, refuse to consider alleged error in finding defendant guilty of contempt, in the sentence imposed therefor,

and in committing him to jail notwithstanding his appeal and offer to give bond pending appeal. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.

4. A magistrate exceeds his authority, and errs, in sending defendant to jail, to serve his sentence for contempt, after he has appealed from the sentence and offered to give bond, pending the appeal; as, having offered to give bond, his appeal operates, under Cr. Code 1912, sec. 100, as a supersedeas. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.

CONTINUANCE.

1. Motion for continuance of trial set two days after indictment was returned and one day after defendants were furnished the coroner's evidence and inquisition, *held* addressed to the discretion of the trial Judge, which was not erroneously exercised by the denial of the motion. *State v. Griffin*, 82 S. E. 254, 98 S. C. 105.
2. The hours of the sessions of the Court and the granting or refusing of motions for a continuance, either within or beyond the term, are in the discretion of the trial Court. *Lummas Cotton Gin Co. v. Counts*, 82 S. E. 391, 98 S. C. 136.
3. Continuance asked by defendant, on the magistrate overruling his motion for change of venue, to enable him to apply for mandamus to compel the change, is properly refused; his remedy being by appeal. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
4. There is no abuse of discretion in refusing continuance for absence of defendant's witnesses, he having had ample notice for trial, and simply relied on his belief, in which he was mistaken, that change of venue would be granted. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.

CONTRACTS.

1. Contracts that are unlawful will not be enforced. *Maybank*

- & *Co. v. Rogers*, 82 S. E. 422, 98 S. C. 279.
2. Under a contract providing that C. was not to cut or sell any live pine timber for five years, except with the written consent of K., and that, when sold or delivered, C. should pay K. a commission of 5 per cent. on all timber sold, K. was not entitled to a commission on timber sold more than five years after execution of the contract. *Keenan v. Matthews*, 82 S. E. 431, 98 S. C. 226.
 3. An agent to make a contract is not authorized to rescind or vary the rights of his principal, unless special authority thereto is shown. *Maybank & Co. v. Rogers*, 82 S. E. 422, 98 S. C. 279.
 4. Where a water company having a franchise to furnish water to consumers is guilty of any illegal discrimination by charging certain consumers a less rate than it charges another consumer, the remedy is to prevent the discrimination, and the latter may not sue to compel the company to grant him the less rate. *Paris Mt. Water Co. v. Camperdown Mills*, 82 S. E. 417, 98 S. C. 304.
 5. A water company furnishing water to a consumer pursuant to a contract whereby the company agrees to supply water at a specified rate, minimum \$15 per quarter, fixed as the 1st days of January, April, July, and October, and which provides that the contract shall expire on January 1st, but to continue in force from quarter to quarter unless 30 days' notice of termination is given by either party, and which authorizes the company to cut off the water for delinquency in payment for 30 days, does not authorize the company to collect interest on water bills. *Id.*, 82 S. E. 417, 98 S. C. 304.
 6. Where plaintiffs, as subcontractors, agreed to do work for a railroad contractor, and to sign the same kind of a contract with him as he had with the railroad company, the contract between their principal and the railroad company was incorporated, by reference, in the contract between plaintiffs and the principal. *Twiggs v. Williams*, 82 S. E. 676, 98 S. C. 431.
 7. Where a contract for railroad construction provided that grading, for which plaintiffs should be paid a stipulated sum per cubic yard, should include all excavations and embankments, and should be paid for "one way only," plaintiffs' recovery was not necessarily limited to excavations within the limits of the roadbed. *Twiggs v. Williams*, 82 S. E. 676, 98 S. C. 431.
 8. Under a contract to sell certain goods at a price f. o. b. a certain point, to be shipped to purchaser at another point named, a delivery to a carrier on a bill of lading to shipper's own order notifying purchaser at place named for delivery, freight charges to be there collected; and forwarding such bill of lading attached to draft for contract price less freight charges to f. o. b. point, to be delivered to purchaser on his paying the draft at bank nearest his place of business, at a point other than that of destination, is not a delivery of the goods to the purchaser nor a performance of the contract by the seller, where the goods never reached destination because the freight charges thereon were not prepaid. *Planters Oil Co. v. Lightsey*, 81 S. E. 1102, 98 S. C. 8.

CORONERS.

1. A coroner's inquest is within, the spirit of Const., art. I. sec. 15, requiring all Courts to be public. *State v. Griffin*, 82 S. E. 254, 98 S. C. 105.
2. A coroner's inquest is merely a preliminary investigation and not a trial involving the merits, and a suspected person has no right to appear by counsel and cross-examine the witnesses. *Id.*, 82 S. E. 254, 98 S. C. 105.

CORPORATIONS.

1. A foreign corporation, having a railroad running through the county and maintaining offices and agents therein, was a resident thereof, within Code Civ. Proc. 1912, sec. 174, providing that the action may be tried in the county wherein either defendant resided when it was commenced, and it was error to transfer the cause to the county where the other defendant resided. *Hayes v. Seaboard Air Line Ry.*, 81 S. E. 1102, 98 S. C. 6.
2. Allegation as to defendant's lack of knowledge or information respecting plaintiff's corporate existence held merely a general denial, which did not put plaintiff's corporate existence or capacity to sue in issue. *Lumus Cotton Gin Co. v. Counts*, 82 S. E. 891, 98 S. C. 186.

CONTRIBUTORY NEGLIGENCE.

1. It is not to be reasonably supposed that a reference to the policy of Congress as to the doctrine of contributory negligence affected the verdict, where the jury were instructed that they were bound by the law of this State, and if the evidence proved that plaintiff was guilty of contributory negligence, she could not recover. *Thornton v. Spartan Mills*, 82 S. E. 414, 98 S. C. 262.
2. Where decedent, a water carrier employed by a railroad construction contractor, with knowledge that he was too deaf to hear an approaching train, went on the track in front of a train, running backwards, in plain sight, and was struck and killed, though attempts were made by persons on the end of the train to warn him to get out of the way, he was guilty of contributory negligence, and no recovery could be had for his death. *Dix v. A. C. L. R. R. Co.*, 82 S. E. 798, 98 S. C. 492.

3. It is not contributory negligence as a matter of law for a brakeman, assisting in operating a switch engine, to get on or off a moving engine, unless the situation is such as to make the danger of doing it apparent to a man of ordinary prudence. *Sturdyvin v. A. & C. A. L. R. R. Co.*, 82 S. E. 275, 98 S. C. 125.
4. Whether a brakeman, injured while assisting in operating a switch engine, was guilty of contributory negligence in attempting to mount the engine while in motion, held, under the evidence, for the jury. *Sturdyvin v. A. & C. A. L. R. R. Co.*, 82 S. E. 275, 98 S. C. 125.
5. Where the servant of a railroad was run down in the yards, but there were no eyewitnesses to his death, it will not be presumed that he intended to commit suicide, and threw himself under the cars, but it will be presumed that he was attempting to carry out his duties with due care. *Thornton v. S. A. L. Ry.*, 82 S. E. 433, 98 S. C. 348.

COSTS.

1. The Circuit Court in an action at law has no authority to direct in advance who shall pay the costs on appeal from the judgment directed by it, and, where it directs in advance who shall pay the costs, it may subsequently on application vacate the provision. *Greer v. Keaton*, 82 S. E. 424, 98 S. C. 192.
2. An order which is in effect a dismissal of the complaint entitles defendant to costs. *Hambright v. Southern Ry.—Carolina Division*, 82 S. E. 416, 98 S. C. 219.
3. The Constitution guaranteeing accused in criminal cases the right of trial by jurors, it is error for a magistrate to require a defendant, demanding a jury, to pay the jurors; the inference from the absence of provision for payment of jurors being that they are to serve without pay. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.

4. The salary provided for the sheriff of Barnwell county by 1 Civil Code, sec. 1486, is in lieu of the charges which otherwise might have been made against the county under the general fee bill contained in section 4280, and such fees are not chargeable against the county under the exception in section 1528. *Morris v. Buist*, 82 S. E. 675, 98 S. C. 415.

CRIMINAL LAW.

1. Under Const., art. I, sec. 17, providing for prosecution for crime only in the county where it was committed, accused could not be lawfully convicted in L. county for the sale of a mortgaged mule in C. county. *State v. McCoy*, 82 S. E. 280, 98 S. C. 183.
2. Ordinarily it is not permissible to instruct the jury that the testimony has a particular "drift." *State v. Riley*, 82 S. E. 621, 98 S. C. 386.
3. A dying declaration by deceased having been admitted, it was error to charge that the law presumes a party who has given up all hope will tell the truth. *State v. Riley*, 82 S. E. 621, 98 S. C. 386.
4. The modification of an instruction that each circumstance relied upon by the State must be proved to the satisfaction of the jury to a moral certainty or beyond a reasonable doubt or disregarded, by adding that the force of all circumstances were with the jury, *held* not erroneous. *State v. Griffin*, 82 S. E. 254, 98 S. C. 105.
5. Motion for continuance of trial set two days after indictment was returned and one day after defendants were furnished the coroner's evidence and inquisition, *held* addressed to the discretion of the trial Judge, which was not erroneously exercised by the denial of the motion. *State v. Griffin*, 82 S. E. 254, 98 S. C. 105.
6. Code Civ. Proc. 1912, sec. 88, relative to answers in magistrates' Courts showing that the title to real estate is in question, *held* inapplicable to criminal cases, and the magistrate in such a case properly refused to countersign such an answer. *State v. Richardson*, 82 S. E. 353, 98 S. C. 147.
7. Under Cr. Code 1912, secs. 94, 95, 98, on appeal from magistrate's Court, affidavits as to the testimony submitted by accused *held* not part of the proceedings upon which the appeal was to be heard, and the Court properly refused to consider them. *State v. Richardson*, 82 S. E. 353, 98 S. C. 147.
8. Code Civ. Proc. 1912, sec. 407, relative to determining alleged errors of fact on appeals to the Circuit Court from inferior Court on affidavits or testimony, does not apply to criminal cases in view of section 8. *Id.*, 82 S. E. 353, 98 S. C. 147.
9. On a trial for murder, one jointly indicted with defendant, but not on trial, was a competent witness. *State v. Griffin*, 82 S. E. 254, 98 S. C. 105.
10. Under Const., art. I, sec. 17, prohibiting double jeopardy, accused, having been acquitted of the offense of breaking and entering another's premises in the nighttime with intent to steal, cannot thereafter be put on trial and convicted on account of the same entry for the offense of entering without breaking, with intent to steal. *State v. Mitchell*, 82 S. E. 676, 98 S. C. 474.
11. The defense of *alibi* is entitled to be considered by the jury the same as any other defense. *State v. Smalls*, 82 S. E. 421, 98 S. C. 297.
12. The ground of affiant's belief that he cannot have a fair trial before the magistrate, being based on his rulings in the former trial which, if erroneous, could be corrected on appeal, had the jury found defendant guilty, is insufficient for change of venue. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.

18. Under the statute, the affidavit for change of venue, on the ground that affiant cannot have a fair trial before the magistrate, must state facts with such definiteness and certainty that the Court can determine their sufficiency, and if on information and belief, the sources and grounds thereof, so that the affidavit, if false, would afford the basis of an indictment for perjury. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
14. Continuance asked by defendant, on the magistrate overruling his motion for change of venue, to enable him to apply for mandamus to compel the change, is properly refused; his remedy being by appeal. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
15. There is no abuse of discretion in refusing continuance for absence of defendant's witnesses, he having had ample notice for trial, and simply relied on his belief, in which he was mistaken, that change of venue would be granted. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
16. It is not proper for the magistrate, on appeal from a conviction before him, to appear in the Circuit Court and argue in support of his judgment. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
17. Where a defendant testifies in his own behalf, his character for veracity is thereby opened, and he may be cross-examined about any of his past transactions affecting his credibility; but his testimony in his own behalf does not open his general moral character. *State v. Knox*, 82 S. E. 278, 98 S. C. 114.
18. In a prosecution for assault and battery with intent to kill, where defendant testified in his own behalf, questions on cross-examination as to whether he had been in similar difficulties before, and had cut a certain named person, did not tend to impeach his credibility, as distinguished from his general moral character, and hence were inadmissible. *State v. Knox*, 82 S. E. 278, 98 S. C. 114.
19. Such testimony was inadmissible also because it tended to expose defendant to a criminal liability, or to some kind of punishment, or to a criminal charge. *State v. Knox*, 82 S. E. 278, 98 S. C. 114.
20. Under an indictment charging assault and battery with intent to kill, a jury can find the defendant guilty of an assault and battery. *Id.*
21. Evidence, in a prosecution for assault and battery with intent to kill, where defendant attempted to show that he acted in self-defense, held to require the submission of simple assault and battery. *Id.*
22. It is not error to refuse to submit the question of assault and battery under an indictment for assault and battery with intent to kill, unless there is testimony to show that defendant is only guilty of assault and battery. *Id.*
23. As to uttering a postdated cheque. *See State v. Winter*, 82 S. E. 419, 98 S. C. 294.
24. A plea of not guilty included the defense of insanity. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.
25. Defendant held not prejudiced by the admission of certain confessions alleged to have been made by defendant to police officers under promise of reward. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.
26. Where it was admitted in a homicide case that there was ill feeling between the parties, it was not ground for reversal that decedent's father was not permitted to answer whether defendant and decedent were on good terms on a certain day before the killing. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.
27. Where in a homicide case it was admitted that ill feeling previously existed between the parties because of deceased's conduct toward defendant's sis-

ter, it was not ground for reversal to refuse to permit her to testify as to decedent's conduct. *Id.*, 82 S. E. 879, 98 S. C. 498.

DAMAGES.

1. If a tort is committed under such circumstances that a person of ordinary reason and prudence would have been conscious of it as such, punitive damages may be inflicted though there is no wilful intent. *Eberle v. Southern Ry. Co.*, 79 S. E. 793, 98 S. C. 89.
2. A passenger is not required to minimize, by paying a cash fare, damages from an anticipated wrong of ejection, when the ticket presented by him is good, but is claimed by the conductor to be bad. *McKeown v. Southern Ry. Co.*, 82 S. E. 437, 98 S. C. 338.
3. Want of wilfulness of the ticket agent in issuing to a passenger a ticket containing a limitation which led the conductor to believe it was not good on that train cannot negative the wilfulness of the conductor in ejecting the passenger without investigation of his reasonable explanation. *McKeown v. Southern Ry. Co.*, 82 S. E. 437, 98 S. C. 338.
4. In an action for damages for assault, the testimony of the magistrate fining defendant for the assault, that he considered that \$5 imposed a sufficient fine for the offense, was incompetent. *Barnett v. Gottlieb*, 82 S. E. 406, 98 S. C. 180.
5. The recovery under Federal Employers' Liability Act (act April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. St. Supp. 1911, p. 1322) for the wrongful death of a servant is limited to compensation for pecuniary loss. *Bennett v. So. Ry.—Car. Div.*, 79 S. E. 710, 98 S. C. 89.
6. A recovery of punitive damages allowed in case of wrongful death is limited to the material loss which is susceptible of a pecuniary valuation, and does not include the inestimable loss of the society and companionship of a deceased relative, though it is broad enough to include damages for the loss of the services of husband or wife, and, in case the beneficiary is a child, damages for the loss of training, counsel, education, and nurture which the deceased would have bestowed. *Bennett v. So. Ry. Co.—Car. Div.*, 79 S. E. 710, 98 S. C. 89.
7. A charge that a recovery could be had under the Federal Employers' Liability Act for the damages suffered by the wife and children of decedent only if dependent upon him, and only to the extent that he contributed to their needs, and that in estimating such damages the jury might take into consideration such contributions as a married daughter or adult child would reasonably have a right to expect, under circumstances rendering such daughter or child dependent upon such parent; *held*, not error, and if erroneous, then harmless, as there was no evidence that decedent contributed to such daughter or child. *Thornton v. S. A. L. Ry.*, 82 S. E. 433, 98 S. C. 348.
8. Where the Court, in an action for the wrongful death of a husband and father, charged that the law only intended to reimburse the family dependent upon the husband, a charge that it made no difference how much the deceased was earning, the question being how much did he contribute for the support of his family, if erroneous, was harmless. *Thornton v. S. A. L. Ry.*, 82 S. E. 433, 98 S. C. 348.
9. In an action for the wrongful death of a father, where a charge was requested that in determining the probable duration of contributions to children, one of whom was married, and the other of whom was a boy 14 years of age, it must be considered that there was no legal responsibility resting on the father to support children who have arrived at the age of 21

- years, it was not error to add that if those should be found the facts, they should be considered. *Thornton v. S. A. L. Ry.*, 82 S. E. 433, 98 S. C. 348.
10. In an action for damages for an excessive distress for rent, an instruction that the jury might give punitive damages against defendant for gross negligence in keeping his accounts with the tenant was not erroneous, where the Court charged in the same connection that defendant would not be liable for punitive damages unless so grossly negligent that the law would impute wilfulness on account thereof. *Cannon v. Cox*, 82 S. E. 399, 98 S. C. 185.
 11. In an action for actual and punitive damages for excessive distress for rent, evidence that defendant was reckless in ascertaining the amount due and distrained for an excessive sum is admissible to sustain the allegation for punitive damages. *Cannon v. Cox*, 82 S. E. 399, 98 S. C. 185.
 12. As to damages in actions for loss of goods in hands of interstate carrier. See *Varnville Furniture Co. v. C. & W. C. Ry. Co.*, 79 S. E. 700, 98 S. C. 63.

DEATH.

1. The recovery under Federal Employers' Liability Act for the wrongful death of a servant is limited to compensation for pecuniary loss. *Bennett v. Southern Ry.—Carolina Division*, 79 S. E. 710, 98 S. C. 42.
2. The measure of damages allowed in actions for wrongful death held limited to the actual loss suffered, which, in case the deceased is a husband or father, or wife or mother, may include loss of services or counsel and training, but not loss of companionship. *Id.*, 79 S. E. 710, 98 S. C. 42.
3. The refusal of a charge in an action for the wrongful death of a servant, which assumed that he was not killed in a certain manner, is proper, where the evi-

- dence raised conflicting inferences. *Thornton v. S. A. L. Ry.*, 82 S. E. 433, 98 S. C. 348.
4. In an action for the wrongful death of a train inspector, killed by a train, evidence held sufficient to carry the case to the jury. *Thornton v. S. A. L. Ry.*, 82 S. E. 433, 98 S. C. 348.
 5. In an action for the wrongful death of a husband and father, where there was no evidence that he contributed to the support of a married daughter, the giving of an instruction on the right of children who had reached their majority to expect assistance in case of sickness, etc., was harmless, if erroneous, where the jury were repeatedly charged that recovery could be had only by the dependent wife and children, to the amount the deceased contributed to their support. *Thornton v. S. A. L. Ry.*, 82 S. E. 433, 98 S. C. 348.
 6. Where the Court, in an action for the wrongful death of a husband and father, charged that the law only intended to reimburse the family dependent upon the husband, a charge that it made no difference how much the deceased was earning, the question being how much did he contribute for the support of his family, if erroneous, was harmless. *Thornton v. S. A. L. Ry.*, 82 S. E. 433, 98 S. C. 348.
 7. In an action for the wrongful death of a father, where a charge was requested that in determining the probable duration of contributions to children, one of whom was married, and the other of whom was a boy 14 years of age, it must be considered that there was no legal responsibility resting on the father to support children who have arrived at the age of 21 years, it was not error to add that if those should be found the facts, they should be considered. *Thornton v. S. A. L. Ry.*, 82 S. E. 433, 98 S. C. 348.
 8. In action for death of unmarried man whose father and mother were dead, evidence held

insufficient to make a question for the jury as to whether a brother was dependent upon him within the Federal Employers' Liability Act. *Jones v. Charleston & W. C. Ry. Co.*, 82 S. E. 415, 98 S. C. 197.

DEEDS.

See Cancellation of Instruments.

1. The construction placed on a deed by the grantor after its execution is immaterial in its interpretation. *Church v. Moody*, 82 S. E. 428, 98 S. C. 234.
2. A deed from husband to wife, conveying the land to her "and the heirs of my body begotten in wedlock with my wife," held, when construed with the warranting part, which was to the wife "and her heirs as above stated and her heirs and assigns," to convey a fee conditional to the wife, so that the land, on her death without disposing of it, passed to her children begotten of the grantor. *Church v. Moody*, 82 S. E. 428, 98 S. C. 234.
3. A grantee whose title fails cannot recover the land as against a hostile claimant, where the consideration named in the deed has been repaid to him by the grantor. *Church v. Moody*, 82 S. E. 428, 98 S. C. 234.
4. A conveyance to insured of the fee before the policy was written by his wife's unwitnessed deed constituted him the equitable owner of the fee, with an insurable interest. *Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244.
5. Proof of execution of deed. *See Evidence*, par. 25. *Padgett v. N. C. Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244.
6. Where defendant sold plaintiff a tract of land in accordance with specified boundaries, and the tract described in the deed corresponded with the courses and distances pointed out, a false representation that the tract contained 20 acres, when in fact it only contained 12.4 acres, was insufficient to establish a gross deficiency entitling plaintiff to recover a proportionate part of the price. *Patterson v. Walker*, 82 S. E. 432, 98 S. C. 286.
7. Where land was conveyed to a woman and to her bodily heirs and assigns forever, she took a fee conditional, and might, at common law, upon the birth of lawful issue, convey the land in fee simple. *Crawford v. Masters*, 82 S. E. 793, 98 S. C. 458.
8. A conveyance of standing timber silent as to the time when the purchaser should begin to cut and remove the timber, but providing that the time limit should be five years from the beginning of the cutting and removal, which might be extended on the payment by the purchaser of interest on the purchase price, calls for the beginning of the cutting and removal of the timber within a reasonable time, and, where the purchaser and his assignee failed for twelve years to begin to cut and remove the timber and did not offer to pay interest on the price, a forfeiture of the conveyance was warranted. *Minshew v. A. C. L. Corporation*, 81 S. E. 1027, 98 S. C. 8.
9. A contract for the sale of standing timber silent as to the time when the purchaser should begin to cut and remove the timber, but stipulating that the time limit should be five years from the time the purchaser begins the cutting and removal, subject to extensions from year to year on the payment by the purchaser of interest on the price, is not an absolute conveyance in fee, but is in the nature of a lease, and the purchaser failing to remove the timber within a reasonable time has no interest therein. *Minshew v. A. C. L. Corp.*, 81 S. E. 1027, 98 S. C. 8.
10. The language of the warranty clause in a deed may be considered for the purpose of ascertaining the meaning of an ambiguous or doubtful expression

in the *habendum* clause. *Church v. Moody*, 82 S. E. 428, 98 S. C. 234.

11. If an ambiguous or doubtful expression is used in the *habendum* clause of a deed the Court in ascertaining the intention of the parties will incline to a construction against the interest of the grantor rather than to a construction in favor of his interest. *Church v. Moody*, 82 S. E. 428, 98 S. C. 234.
12. The construction placed upon a deed by the grantee in a subsequent deed may be material in considering his rights under it. *Church v. Moody*, 82 S. E. 429, 98 S. C. 234.

DEVISES.

1. Testatrix bequeathed the balance of her estate to be used for keeping up certain graves at F. church, and also as an endowment fund for the benefit of such church. The church was an unincorporated religious institution, managed by trustees, the graves being located in the graveyard of the church, wholly on its property. *Held*, that the words providing that a part of the residuary estate should be used to keep up the graves were not intended to create an enforceable trust, but one of a precatory nature, and that the whole devise was sustainable as a devise to charity. *Drennan v. Agurs*, 82 S. E. 622, 98 S. C. 391.

DETINUE.

See Claim and Delivery.

DISMISSAL OF ACTIONS.

1. An order which is in effect a dismissal of the complaint entitles defendant to costs. *Hambricht v. Southern Ry.*—*Carolina Division*, 82 S. E. 416, 98 S. C. 219.

DISTRESS.

1. In an action for excessive distress for rent, an instruction that the jury might give punitive damages for gross negli-

gence of defendant in keeping his accounts *held* not erroneous, where the Court charged that he would not be so liable unless so grossly negligent that the law would impute wilfulness. *Cannon v. Coz*, 82 S. E. 399, 98 S. C. 185.

2. Evidence in an action under Civ. Code 1912, sec. 3520, for punitive damages for an excessive distress for rent, *held* to authorize submitting to the jury whether defendant acted in reckless disregard of plaintiff's rights. *Cannon v. Coz*, 82 S. E. 399, 98 S. C. 185.
3. Where the levy under a distress warrant is excessive, the person procuring the levy is liable as a trespasser *ab initio*. *Id.*, 82 S. E. 399, 98 S. C. 185.
4. In an action for actual and punitive damages for excessive distress for rent, evidence that defendant was reckless in ascertaining the amount due and distrained for an excessive sum is admissible to sustain the claim for punitive damages. *Id.*, 82 S. E. 399, 98 S. C. 185.

ELECTION OF REMEDIES.

1. Where complainant sued for specific performance to which he was not entitled, he, having elected his remedy, was not entitled to have the bill retained and the suit considered as an action for breach of contract. *Elliott v. Page*, 82 S. E. 620, 98 S. C. 400.

ELEEMOSYNARY CORPORATIONS.

See Charities. *Lindler v. Columbia Hospital*, 81 S. E. 512, 98 S. C. 25.

ENTERING HOUSE WITH INTENT TO STEAL.

1. An acquittal on an indictment for burglariously breaking and entering a dwelling house in the nighttime with intent to steal certain goods, is a bar to a subsequent indictment for entering, without breaking, the same house

at the same time with intent to steal the same goods. *State v. Mitchell*, 82 S. E. 676, 98 S. C. 474.

ENTRY ON LANDS AFTER NOTICE.

1. Code Civ. Proc. 1912, sec. 88, providing that in every action brought in a Court of magistrate, where the title to real property shall come in question, defendant may set forth in his answer any matter showing that such title will come in question, and that the magistrate shall thereupon countersign the answer and deliver it to plaintiff, does not apply to criminal cases, and the magistrate in a criminal case properly refused to countersign the answer. *State v. Richardson*, 82 S. E. 853, 98 S. C. 147.
2. In a prosecution for unlawful entry on lands of another, the magistrate's Court is not deprived of jurisdiction by tender of issue as to title. *State v. Richardson*, 82 S. E. 853, 98 S. C. 147.

EQUITY.

See Specific Performance; Trusts.

1. Where complainant sued for specific performance to which he was not entitled, he, having elected his remedy, was not entitled to have the bill retained and the suit considered as an action for breach of contract. *Elliott v. Page*, 82 S. E. 620, 98 S. C. 400.
2. Where a purchaser entered into and remained in possession claiming under the contract to purchase, his rights to the land were equitable as against the vendor or a subsequent purchaser. *Mitchell v. Hamilton*, 82 S. E. 425, 98 S. C. 289.
3. *See Specific Performance. Kirven v. Wilds*, 82 S. E. 673, 98 S. C. 463.

ESTOPPEL.

1. Where, in an action for loss on freight and penalty for nonpayment within 40 days, it appeared

that plaintiffs had received and retained an order in lieu of money without objection until after the penalty had accrued, they were estopped to claim the penalty. *W. J. Andrews & Son v. Atlantic Coast Line R. Co.*, 82 S. E. 403, 98 S. C. 212.

EVIDENCE.

1. Where there is a general prohibition with exceptions, the burden of proof is with him who claims to be within the exception. *Maybank & Co. v. Rogers*, 82 S. E. 422, 98 S. C. 279.
2. Contracts which are lawful cannot be varied and will be enforced as written except for mutual mistake and fraud. *Maybank & Co. v. Rogers*, 82 S. E. 422, 98 S. C. 279.
3. Contracts that are unlawful will not be enforced, and contracts that are suspicious will be inquired into and proof *aliunde* allowed. *Maybank & Co. v. Rogers*, 82 S. E. 422, 98 S. C. 279.
4. In an action for the balance due under an employment contract, the only issue being whether plaintiff's compensation was to be based solely on commissions, or whether defendant undertook that it should not be less than a certain amount, evidence as to the salary plaintiff received after he quit defendant's service was properly excluded. *Crawford v. Rice & Hutchins Baltimore Co.*, 82 S. E. 273, 98 S. C. 121.
5. Evidence showing a chain of title in plaintiffs, coupled with testimony that their predecessors in title paid taxes on the land and had possession for more than 40 years, makes out a *prima facie* case of ownership raising a presumption that plaintiffs' predecessors took under a grant from the State. *Sea Coast Timber Co. v. Thomas*, 82 S. E. 274, 98 S. C. 111.
6. In an action to recover land, where neither party deraigned title from the State, but both introduced evidence tending to raise the presumption of a grant,

- the question of title is for the jury. *Sea Coast Timber Co. v. Thomas*, 82 S. E. 274, 98 S. C. 111.
7. In an action for damages for assault, the testimony of the magistrate fining defendant for the assault that he considered that \$5 imposed a sufficient fine for the offense, was incompetent. *Barnett v. Gottlieb*, 82 S. E. 406, 98 S. C. 180.
 8. In an action against a carrier for loss on freight and a penalty for nonpayment within 40 days, evidence of defendant's dealings with other claimants was properly excluded. *W. J. Andrews & Son v. Atlantic Coast Line R. Co.*, 82 S. E. 403, 98 S. C. 212.
 9. But it was error to exclude evidence of former dealings between the parties. *Id.*, 82 S. E. 403, 98 S. C. 212.
 10. Where there was nothing in the record to show that the beneficiary was bound to pay the premium on the accident policy in suit, the exclusion of a question to the beneficiary as to whether she had paid the premium was not error. *Wylie v. United States Health & Accident Ins. Co.*, 82 S. E. 402, 98 S. C. 273.
 11. In an action on a fire policy, evidence on trial held to sufficiently establish the loss. *Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244.
 12. In an action on an accident policy, where defendant's witness stated that he went to see insured, and insured, in reply to a question, stated that he had paid the premium, the question of the payment of the premium became one for the jury, though there was other evidence of nonpayment. *Wylie v. United States Health & Accident Ins. Co.*, 82 S. E. 402, 98 S. C. 273.
 13. The admission or exclusion of evidence on the ground of relevancy or irrelevancy is a matter within the sound discretion of the trial Court, whose judgment will not be reviewed unless unreasonably exercised or abused. *Crawford v. Rice & Hutchins Baltimore Co.*, 82 S. E. 273, 98 S. C. 121.
 14. A dying declaration by deceased having been admitted, it was error to charge that the law presumes a party who has given up all hope will tell the truth. *State v. Riley*, 82 S. E. 621, 98 S. C. 386.
 15. Evidence on prosecution of an attorney employed, among other matters, to collect a claim, who after collecting a part thereof refused, on demand, to pay it over, claiming his client owed him more than that for professional services, is insufficient to show fraudulent intent. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
 16. In a prosecution for assault and battery with intent to kill, where defendant testified in his own behalf, questions on cross-examination as to whether he had previously been in similar difficulties, held inadmissible as exposing him to a criminal liability, or to some kind of punishment, or to a criminal charge. *State v. Knox*, 82 S. E. 278, 98 S. C. 114.
 17. Where a defendant testifies in his own behalf, his character for veracity is thereby opened, and he may be cross-examined about any of his past transactions affecting his credibility; but his testimony in his own behalf does not open his general moral character. *State v. Knox*, 82 S. E. 278, 98 S. C. 114.
 18. In a prosecution for assault and battery with intent to kill, where defendant testified in his own behalf, questions on cross-examination whether he had been in similar difficulties before, and had cut a certain named person, did not tend to impeach his credibility, as distinguished from his general moral character, and hence were inadmissible. *Id.*, 82 S. E. 278, 98 S. C. 114.
 19. Where a conveyance by husband to wife is attacked as fraudulent as to his creditors the burden is on him to establish

- good faith by the most satisfactory evidence. *Tucker v. Weatherbee*, 82 S. E. 638, 98 S. C. 402.
20. On a trial for murder, one jointly indicted with defendants, but not on trial, was a competent witness. *State v. Griffin*, 82 S. E. 254, 98 S. C. 105.
21. The negligence of a railroad company in failing to provide handrails and running boards at the sides of the tender of switch engines cannot be determined conclusively by what other railroad companies did or failed to do, but the fact that two railroad systems had so placed handrails and running boards has some bearing on the issue. *Sturdyvin v. A. & C. A. L. R. R. Co.*, 82 S. E. 275, 98 S. C. 125.
22. Whether testimony is sufficient to rebut the presumption of negligence arising in case of live stock killed on railroad track is an issue for the jury. *Matthews v. A. C. L. R. R. Co.*, 82 S. E. —, 98 S. C. 204.
23. A party cannot on appeal take advantage of error in the admission of evidence, where no ruling was made on his objection, and the lower Court certified that he did not hear the objection; for it is the duty of one objecting to evidence to call it to the attention of the Court and have a ruling thereon. *Wilson v. S. Ry. Co.*, 82 S. E. 431, 98 S. C. 209.
24. The proof of loss furnished the insurer under stipulations in policy is not admissible as proof in Court. But the testimony in Court may refer to data stated in the application or policy at the time the contract of insurance was made. *Padgett v. N. C. Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244.
25. The execution of a deed may be proven by its production, and proof of the grantor's signature or her acknowledgment that she had executed it. *Padgett v. N. C. Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244.
26. Tax receipts are admissible in evidence, as tending to prove claim of ownership and that the State has parted with its title, in actions for recovery of real property. *Mitchell v. Hamilton*, 82 S. E. 425, 98 S. C. 289.
27. The admission of irrelevant testimony will not be reviewed on appeal, unless shown to have been prejudicial to appellant. *Mitchell v. Hamilton*, 82 S. E. 425, 98 S. C. 289.
28. The force and effect of any evidence is for the jury, and a charge that the defense of *alibi* is to be received with caution, is upon the facts in violation of Const., art. V, sec. 26. *State v. Smalls*, 82 S. E. 421, 98 S. C. 297.
29. A ruling that a question, asked a prosecuting witness, father of deceased, on cross-examination by defendant's counsel, "So then, they were not on good terms the Thursday afternoon that I. S. Lemacks (defendant) went to your house to see your son (deceased) about the way he had outraged his sister?" is irrelevant and incompetent, on a trial for murder, is not reviewable on appeal, where the answer was subsequently admitted, and not prejudicial to defendant, who admitted the existence of ill will between him and the deceased at the time in question, and this was not denied by the State. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.
30. The admission of an alleged confession, over objection as not free and voluntary, substantially the same as other statements of defendant admitted without objection, and tending to corroborate statements of defendant in Court, as to the cause leading to the commission of the homicide, is not prejudicial to defendant, and will not be reviewed on appeal. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.
31. The recitals of a written contract for sale of goods for future delivery is not sufficient proof, under Civil Code, secs. 3421, 3422, of the intent of the parties to actually deliver and receive in kind the goods in question.

- Maybank & Co. v. Rogers*, 82 S. E. 422, 98 S. C. 279.
32. Statements or acts of an agent beyond the scope of his authority are inadmissible in evidence against his principal. *Ib.*, 82 S. E. 422, 98 S. C. 279.
33. Testimony as to the making of other contracts by defendant under which actual delivery was had, was relevant as to his intention in making the contracts in question. *Ib.*, 82 S. E. 422, 98 S. C. 279.
34. Where reference is made in a written contract to a prior conversation for the purpose of confirming so much as is included in the written contract, the portions of the conversation not so included are not a part of the contract, and testimony as to them is inadmissible. *Twiggs v. Williams*, 82 S. E. 676, 98 S. C. 431.
35. As to burden of proof in actions against warehousemen, see *Carolina Rice Co. v. West Point Mills Co.*, 82 S. E. 679, 98 S. C. 476.
36. In a suit for the forfeiture of a conveyance of standing timber on the ground that the purchaser and his assignee had not commenced to cut and remove the timber within a reasonable time, evidence that the purchaser and the assignee had consulted an attorney before the execution of the conveyance as to the legal effect thereof was inadmissible. *Minshew v. A. C. L. Corporation*, 81 S. E. 1027, 98 S. C. 8.
37. Where a forfeiture of a conveyance of standing timber was sought on the ground that the purchaser and his assignee had not begun to cut and remove the timber within a reasonable time, evidence that the grantor at the time of the execution of the conveyance was led to believe by the purchaser that a mill would be erected in the near future near the timber sold was admissible as bearing on the question of reasonable time within which the timber should be cut and removed. *Minshew v. A. C. L. Corp.*, 81 S. E. 1027, 98 S. C. 8.
38. In an action for the death of a locomotive fireman, who was killed when the engine was derailed at a burning trestle, evidence of the engineer's reputation for carefulness is inadmissible. *Bennett v. So. Ry.—Car. Div.*, 79 S. E. 710, 98 S. C. 42.
39. In an action for the wrongful death of a locomotive fireman, killed when his engine was derailed at a burning trestle, where it appeared that immediately after another engine had passed over the trestle it was discovered to be on fire, testimony of a witness that he saw places near by where fire had been dropped is admissible as tending to show the origin of the fire. *Bennett v. So. Ry.—Car. Div.*, 79 S. E. 710, 98 S. C. 42.
40. While negligence cannot be presumed, but must be proved, it may be established by circumstantial evidence. *Thornton v. S. A. L. Ry.*, 87 S. E. 433, 98 S. C. 348.
41. Evidence tending to show that decedent, a car inspector employed in defendant's railroad yard, left its office in a normal condition of mind to inspect an incoming train on the main track; at the same time a switch engine was backing a train of cars on an adjoining track, down the yard, which was dark and unlighted, with no lights or person on the advancing cars or person going ahead of them, or other warning given to warn the employees in the yard of their approach; and that decedent failed to arrive at the point on the main track where he was to commence the inspection of the cars in the incoming train, and was found, later, lying on the sidetrack on which the switch engine had been backing said cars, and had apparently been dragged about 250 yards from a point where his cap was found between the main and sidetracks, with his torch a couple of yards off and blood on the wheels of

the cars which had been backed on the sidetrack, indicating they had run over him. *Held*, sufficient to go to the jury on the issue of whether or not decedent's death was caused by the acts of negligence, or some of them, on the part of defendant alleged in the complaint. *Thorn-ton v. S. A. L. Ry*, 87 S. E. 433, 98 S. C. 348.

42. As to view of locus. *See Thorn-ton v. Spartan Mills*, 82 S. E. 414, 98 S. C. 262.

EXECUTIONS.

1. The procedure prescribed by Code Civ. Proc. 1912, secs. 347-349, for the revival of an execution, must be taken within ten years after judgment. *First Nat. Bank v. Carolina Midland Warehouse Co.*, 82 S. E. 405, 98 S. C. 168.

EXECUTORS AND ADMINISTRATORS.

1. A suit against executors for an accounting of decedent's acts as guardian for a minor is one to recover a "debt" within Civ. Code 1912, sec. 3962, and cannot be brought within 12 months from the death of decedent. *Beach v. Addison*, 82 S. E. 428, 98 S. C. 215.
2. Where the executors of a landowner carried on farming operations after her death, and advanced money to tenants, they are, on final settlement, properly charged with the amount of any unpaid advances. *Ex parte Coleman*, 82 S. E. 674, 98 S. C. 420.
3. Executors *held*, on final accounting, not entitled to commissions on certain receipts and disbursements. *Ex parte Coleman*, 82 S. E. 674, 98 S. C. 420.
4. Where executors sold land belonging to their testatrix, taking for the purchase price the bond of the purchaser, secured by a mortgage on the land, both made payable to themselves, the executors, upon final settlement, being charged with the amount of the bond, are not entitled to demand

that the bond be formally assigned to them. *Ex parte Coleman*, 82 S. E. 674, 98 S. C. 420.

5. Findings of fact by the probate Court concurred in by the Circuit Court as to the person who should administer upon an estate will not be disturbed on appeal. *Ex parte Williams*, 82 S. E. 402, 98 S. C. 211.

FALSE PRETENSES.

1. In a prosecution for drawing and uttering a check without funds to meet it, evidence that the check was antedated was admissible, since the giving of such a check was not within the statute. *State v. Winter*, 82 S. E. 419, 98 S. C. 294.

FEE CONDITIONALS.

1. Though Civ. Code 1912, sec. 3562, making illegitimate children heirs of the mother, applies to a previous conveyance of land to a woman and her bodily heirs, and enables her to convey a fee simple upon the birth of illegitimate issue, the statute is not retroactive. *Crawford v. Masters*, 82 S. E. 793, 98 S. C. 458.
2. Under Civ. Code 1912, sec. 3562, providing that any illegitimate child whose mother shall die intestate and possessed of real property shall be an heir to such property, a woman to whom a fee, conditional on the birth of bodily heirs was conveyed may, after the birth of illegitimate child, convey a fee simple. *Crawford v. Masters*, 82 S. E. 793, 98 S. C. 458.
3. Where land was conveyed to a woman and to her bodily heirs and assigns forever, she took a fee conditional, and might, at common law, upon the birth of lawful issue, convey the land in fee simple. *Crawford v. Masters*, 82 S. E. 793, 98 S. C. 458.
4. The word "my" construed as "her" in a conveyance to a wife and "the heirs of my body begotten in wedlock with" said wife, and to give the wife a fee

conditional in the lands conveyed, in order to effectuate the evident intention of the grantor. *Church v. Moody*, 82 S. E. 428, 98 S. C. 234.

FEEES.

See Costs.

Morris v. Buist, 82 S. E. 675, 98 S. C. 415; *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.

FEDERAL EMPLOYERS' LIABILITY ACT.

1. A charge that a recovery could be had under the Federal Employers' Liability Act for the damages suffered by the wife and children of decedent only if dependent upon him, and only to the extent that he contributed to their needs, and that in estimating such damages the jury might take into consideration such contributions as a married daughter or adult child would reasonably have a right to expect, under circumstances rendering such daughter or child dependent upon such parent, *held*, not error, and if erroneous, then harmless, as there was no evidence that decedent contributed to such daughter or child. *Thornton v. S. A. L. Ry.*, 82 S. E. 438, 98 S. C. 348.
2. Where plaintiff was injured while making up an interstate train his right to recover depended on the Federal Employers' Liability Act, which superseded provisions of the State Constitution as to assumed risk. *Bramlett v. Southern Ry. Co.*, 82 S. E. 501, 98 S. C. 319.
3. Where a railroad employee engaged in interstate commerce leaves no dependent relatives so as to give a right of action for his death under the Federal Employers' Liability Act, there can be no recovery under a State statute giving a right of action to relatives whether dependent or not. *Jones v. Charleston & W. C. Ry. Co.*, 82 S. E. 415, 98 S. C. 197.

4. Under the Federal Employers' Liability Act a servant does not assume the risk of injuries occasioned by the master's negligence. *Thornton v. Seaboard Air Line Ry.*, 82 S. E. 433, 98 S. C. 348.
5. In action for death of unmarried man whose father and mother were dead, evidence *held* insufficient to make a question for the jury as to whether a brother was dependent upon him within the Federal Employers' Liability Act. *Jones v. Charleston & W. C. Ry. Co.*, 82 S. E. 415, 98 S. C. 197.

**FEDERAL SAFETY APPLI-
ANCE ACT.**

1. Where a defective board on the end of an engine tender from which plaintiff fell, was referred to interchangeably as a "foot-board" and a "running board" by defendant's counsel, he was not entitled to a ruling that plaintiff was not within the Federal Employers' Liability Act, because such act does not apply to "footboards." *Bramlett v. Southern Ry. Co.*, 82 S. E. 501, 98 S. C. 319.
2. Whether a defective board on the tender of an engine on which plaintiff attempted to jump and was injured was a "running board" within Federal Employers' Liability Act, prohibiting the use of defective running boards, was for the jury. *Bramlett v. Southern Ry. Co.*, 82 S. E. 501, 98 S. C. 319.

FORFEITURES.

1. In a suit for the forfeiture of a conveyance of standing timber on the ground that the purchaser and his assignee had not commenced to cut and remove the timber within a reasonable time, evidence that the purchaser and the assignee had consulted an attorney before the execution of the conveyance as to the legal effect thereof was inadmissible. *Minshew v. A. C. L. Corporation*, 81 S. E. 1027, 98 S. C. 8.

2. Where a forfeiture of a conveyance of standing timber was sought on the ground that the purchaser and his assignee had not begun to cut and remove the timber within a reasonable time, evidence that the grantor at the time of the execution of the conveyance was led to believe by the purchaser that a mill would be erected in the near future near the timber sold was admissible as bearing on the question of reasonable time within which the timber should be cut and removed. *Minshew v. A. C. L. Corp.*, 81 S. E. 1027, 98 S. C. 8.
3. A conveyance of standing timber silent as to the time when the purchaser should begin to cut and remove the timber, but providing that the time limit should be five years from the beginning of the cutting and removal, which might be extended on the payment by the purchaser of interest on the purchase price, calls for the beginning of the cutting and removal of the timber within a reasonable time, and, where the purchaser and his assignee failed for twelve years to begin to cut and remove the timber and did not offer to pay the interest on the price, a forfeiture of the conveyance was warranted. *Minshew v. A. C. L. Corp.*, 81 S. E. 1027, 98 S. C. 8.
4. A vendor of standing timber may sue for a forfeiture of the conveyance based on the failure of the purchaser and his assignee to begin to cut and remove timber within a reasonable time, without first giving notice to the purchaser or assignee to begin to remove the timber pursuant to the conveyance silent as to the time when the cutting and removal should begin. *Minshew v. A. C. L. Corp.*, 81 S. E. 1027, 98 S. C. 8.
5. A contract for the sale of standing timber silent as to the time when the purchaser should begin to cut and remove the timber, but stipulating that the

time limit should be five years from the time the purchaser begins the cutting and removal, subject to extensions from year to year on the payment by the purchaser of interest on the price, is not an absolute conveyance in fee, but is in the nature of a lease, and the purchaser failing to remove the timber within a reasonable time has no interest therein. *Minshew v. A. C. L. Corp.*, 81 S. E. 1027, 98 S. C. 8.

6. In the absence of a stipulation in contract that the existence of other insurance renders the policy void, the Court cannot declare the policy void on that ground. *Wylie v. U. S. Health & Acc. Ins. Co.*, 82 S. E. 402, 98 S. C. 273.

FORMER JEOPARDY.

1. An acquittal on an indictment for burglariously breaking and entering a dwelling house in the nighttime with intent to steal certain goods, is a bar to a subsequent indictment for entering, without breaking, the same house at the same time with intent to steal the same goods. *State v. Mitchell*, 82 S. E. 676, 98 S. C. 474.

FRAUD.

1. Evidence on prosecution of an attorney employed, among other matters, to collect a claim, who after collecting a part thereof refused, on demand, to pay it over, claiming his client owed him more than that for professional services, is insufficient to show fraudulent intent. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
2. Whether or not a release was obtained by fraud, being submitted to the jury, without objection, and there being evidence upon that issue, the jury had the right to decide it. *Wylie v. U. S. Health & Acc. Ins. Co.*, 82 S. E. 402, 98 S. C. 273.
3. Where the claimant under an insurance policy offered to return a cheque given him as the

consideration for a release, he may attack the release for fraud in an action on the policy. *Wylie v. U. S. Health & Acc. Ins. Co.*, 82 S. E. 402, 98 S. C. 278.

4. Where defendant's father owed plaintiff a debt, defendant's delivery of certain cows in satisfaction thereof was not a promise by defendant to pay the debt of another within the inhibition of the statute of frauds. *Rogers v. Felder*, 82 S. E. 436, 98 S. C. 178.

FRAUDULENT CONVEYANCES.

See Limitation of Actions.

1. Where a husband conveyed property to his wife for an adequate consideration which she received from other sources when there were no suits pending against him, the transaction will not be set aside as in fraud of creditors, who subsequently obtained judgments against him. *Tucker v. Weathersbee*, 82 S. E. 688, 98 S. C. 402.
2. Where certain real property was conveyed by the vendor to a debtor's wife and she paid the price out of her own separate funds, there was no trust in favor of the husband which could be enforced by his creditors. *Tucker v. Weathersbee*, 82 S. E. 688, 98 S. C. 402.
3. Adverse possession is no defense to a suit to set aside alleged fraudulent conveyances. *Tucker v. Weathersbee*, 82 S. E. 688, 98 S. C. 402.
4. Creditors having failed to institute a suit until 1910 to set aside certain alleged fraudulent conveyances executed in 1894 and 1896, respectively, *held* barred by laches. *Tucker v. Weathersbee*, 82 S. E. 688, 98 S. C. 402.
5. Where a conveyance by husband to wife is attacked as fraudulent as to his creditors the burden is on him to establish good faith by the most satisfactory evidence. *Tucker v. Weathersbee*, 82 S. E. 688, 98 S. C. 402.

GAMING.

1. In an action for the seller's failure to deliver cotton sold under a contract for future delivery, invalid unless both parties intended an actual delivery, evidence that the seller, while the agent of another, had made previous contracts with the buyer's agent, under which actual delivery had been made, *held* admissible as evidence of intention. *Maybank & Co. v. Rogers*, 82 S. E. 422, 98 S. C. 279.
2. Under Civ. Code 1912, secs. 3421-3423, providing that contracts for the future sale of cotton shall be void unless both parties, when making it, intend that it shall be actually delivered and received, and putting the burden of showing such intention on the plaintiff, *held*, that the buyer was required to show both its own intention to receive and the seller's intention to deliver, and that the contract itself was not sufficient. *Id.*, 82 S. E. 422, 98 S. C. 279.
3. In an action on contracts for the future delivery of cotton, unlawful unless the buyer and seller, at the time of the contract, intended that the buyer should receive and the seller should deliver, where there was some evidence to sustain the buyer's burden of proving such intention, the question of intention was for the jury. *Maybank & Co. v. Rogers*, 82 S. E. 422, 98 S. C. 279.
4. That brokers, through whom defendant bought and sold cotton for future delivery, closed out his transactions upon his failure to deposit sufficient margins, does not show that defendant had no intention of receiving and delivering the actual cotton, thus rendering the contract bad under Civ. Code 1912, sec. 3421, denouncing dealings in futures. *Gwathney v. Burgiss*, 82 S. E. 894, 98 S. C. 152.

5. Under Civ. Code 1912, sec. 3421, a broker who entered into contracts on behalf of defendant for the future purchase and sale of cotton cannot recover thereon, where defendant had no intention of actually receiving or delivering the cotton. *Id.*, 82 S. E. 394, 98 S. C. 152.
6. A complaint of a broker seeking to recover losses on purchases and sales of cotton for future delivery, made on behalf of a customer, stated a cause of action, where different inferences as to whether the transactions were dealings in futures, denounced by Civ. Code 1912, sec. 3421, could be drawn from its averments. *Gwathney v. Burgess*, 82 S. E. 394, 98 S. C. 152.

GUARDIAN AND WARD.

1. Under Code of Laws, sec. 3962, an action cannot be brought by general guardian of an infant against the personal representatives of a former guardian of the infant for an accounting, and to ascertain the amount due by his estate to the infant, within twelve months after such guardian's death. *Beach v. Addison*, 82 S. E. 428, 98 S. C. 215.

HOMICIDE.

See Criminal Law; Indictment and Information; Witnesses.

1. Evidence, in a prosecution for assault and battery with intent to kill, where defendant attempted to show that he acted in self-defense, held to require the submission of simple assault and battery. *State v. Knox*, 82 S. E. 278, 98 S. C. 114.
2. It is not error to refuse to submit the question of assault and battery under an indictment for assault and battery with intent to kill, unless there is testimony to show that defendant is only guilty of assault and battery. *Id.*, 82 S. E. 278, 98 S. C. 114.
3. Statements by deceased, prior to making an alleged dying declaration that his "wound would kill him," that the "shot would eventually kill him," held insufficient to show a sense of impending death. *State v. Riley*, 82 S. E. 621, 98 S. C. 386.
4. On a trial for murder, one jointly indicted with defendant, but not on trial, was a competent witness. *State v. Griffin*, 82 S. E. 254, 98 S. C. 105.
5. The evidence as to the circumstances under which a homicide was committed being conflicting, the question should be submitted to the jury. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.
6. A ruling that a question, asked a prosecuting witness, father of deceased, on cross-examination by defendant's counsel, "So, then, they were not on good terms the Thursday afternoon that I. S. Lemacks (defendant) went to your house to see your son (deceased) about the way he had outraged his sister?" is irrelevant and incompetent, on a trial for murder, is not reviewable on appeal, where the answer was subsequently admitted, and not prejudicial to defendant, who admitted the existence of ill will between him and the deceased at the time in question, and this was not denied by the State. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.
7. The admission of an alleged confession, over objection as not free and voluntary, substantially the same as other statements of defendant admitted without objection, and tending to corroborate statements of defendant in Court, as to the cause leading to the commission of the homicide, is not prejudicial to defendant, and will not be reviewed on appeal. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.
8. Exclusion of testimony of a sister of defendant as to her ill treatment by deceased prior to the homicide, tending to show cause for ill will by defendant toward deceased, held not prejudicial to defendant on his trial

for murder. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.

9. Where defendant indicted for murder attempted to show that he had been moved to take the life of deceased because of an outrage committed against his sister, and counsel argued the right of a brother to slay his sister's seducer, a charge that, "This Court has jurisdiction of every crime and offense committed in this State. No one has a right to appeal to any other tribunal, and if a man pleads the higher law he is guilty of murder. I won't say if he pleads it he is guilty of murder, but he has no right to say he took the law into his own hands. The higher law has not any force in South Carolina." *Held*, by a majority of the Court, not error. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.
10. Where defendant contended on trial that he was moved by an outrage committed against his sister by deceased to kill the latter, and did not rely upon insanity as a defense; a charge that insanity was not pleaded as a defense, was not prejudicial to defendant; especially where the trial Judge added, that it was a question for the jury to determine whether the defendant had sense enough to know whether he was doing right or wrong. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.
11. On a trial for murder, the jury should be fully instructed as to its power (in effect) to fix the penalty by finding, or omitting to find, a recommendation to mercy, in case the defendant is guilty of murder. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.
12. Where defendant admitted that he killed deceased with a deadly weapon, and the testimony was conflicting, the objection that a conviction was not supported by competent evidence was unsustainable. *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.

ILLEGITIMATES.

1. Though Civ. Code 1912, sec. 3562, making illegitimate children heirs of the mother, applies to a previous conveyance of land to a woman and her bodily heirs, and enables her to convey a fee simple upon the birth of illegitimate issue, the statute is not retroactive. *Crawford v. Masters*, 82 S. E. 793, 98 S. C. 458.
2. Under Civ. Code 1912, sec. 3562, providing that any illegitimate child whose mother shall die intestate and possessed of real property shall be an heir to such property, a woman to whom a fee, conditional on the birth of bodily heirs was conveyed may, after the birth of illegitimate child, convey a fee simple. *Crawford v. Masters*, 82 S. E. 793, 98 S. C. 458.

INDICTMENT AND INFORMATION.

1. Where the regular solicitor was sick, the Court may appoint an acting solicitor, and an indictment signed by him as such is not void. *State v. Smalls*, 82 S. E. 421, 98 S. C. 297.
2. Under an indictment charging assault and battery with intent to kill, a jury can find the defendant guilty of an assault and battery. *State v. Knox*, 82 S. E. 278, 98 S. C. 114.

INSANITY.

1. As defense. *See Criminal Law*, par. 24; *Homicide*, par. 11; *State v. Lemacks*, 82 S. E. 879, 98 S. C. 498.

INSURANCE.

1. A conveyance to insured of the fee before the policy was written by his wife's unwitnessed deed constituted him the equitable owner of the fee, with an insurable interest. *Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244.
2. Where the application for a fire insurance policy provided that the property had been profitable, and that insured had every rea-

- son to believe that it would so continue, but further showed that the building and machinery was put up in August, 1912, and was insured October 29, 1912, so that there was no chance to know that it was profitable, the insurer knew all that insured could know, and there was no warranty of profitability. *Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244.
3. The answer of insured to a question by insurer as to whether the gin was operated by the owner, manager or tenant, that it was operated by the owner, held not sufficiently definite to convict insured of making an untrue answer, or to constitute it a guaranty that on that date the gin was being operated. *Id.*, 82 S. E. 409, 98 S. C. 244.
 4. Technical "proof of loss" held a requirement arising out of a policy for the benefit of the insurer, and distinguished from the proof of loss in Court before the jury pursuant to the rules of evidence, to make a liability on the policy. *Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244.
 5. Under a policy providing for notice and proof of loss, held, that a sworn subscribed statement by insured claiming a total loss, stating that the origin of the fire was unknown, and that all terms of the policy had been complied with, was a reasonably full and exact compliance with the provision. *Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244.
 6. An insurer, on receiving a statement of total loss from insured, 20 days after a fire, by sending an investigator, who talked with insured about the fire and attempted to get him to sign a paper, but made no demand for further or more particular proof of loss, thereby waived any right to such further or particular proof of loss. *Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244.
 7. Where there was nothing in the record to show that the beneficiary was bound to pay the premium on the accident policy in suit, the exclusion of a question to the beneficiary as to whether she had paid the premium was not error. *Wylie v. United States Health & Accident Ins. Co.*, 82 S. E. 402, 98 S. C. 273.
 8. In an action on a fire policy, evidence on trial held to sufficiently establish the loss. *Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244.
 9. In an action on an accident policy, where defendant's witness stated that he went to see insured, and insured, in reply to a question, stated that he had paid the premium, the question of the payment of the premium became one for the jury, though there was other evidence of nonpayment. *Wylie v. United States Health & Accident Ins. Co.*, 82 S. E. 402, 98 S. C. 273.
 10. In an action on an accident policy, where it appeared that a check for part of the policy had been delivered by the insurer's agent to insured before his death, but had not been cashed, a judgment in favor of the beneficiary should protect the agent of the insurer against the unpaid check. *Wylie v. United States Health & Accident Ins. Co.*, 82 S. E. 402, 98 S. C. 273.
 11. In the absence of a stipulation in contract that the existence of other insurance renders the policy void, the Court cannot declare the policy void on that ground. *Wylie v. U. S. Health & Acc. Ins. Co.*, 82 S. E. 402, 98 S. C. 273.
 12. Whether or not a release was obtained by fraud, being submitted to the jury, without objection, and there being evidence upon that issue, the jury had the right to decide it. *Wylie v. U. S. Health & Acc. Ins. Co.*, 82 S. E. 402, 98 S. C. 273.

13. Where the claimant under an insurance policy offered to return a cheque given him as the consideration for a release, he may attack the release for fraud in an action on the policy. *Wylie v. U. S. Health & Acc. Ins. Co.*, 82 S. E. 402, 98 S. C. 273.
14. The contract failing to stipulate a policy of accident insurance was to take effect from the time of delivery, rather than from the time the application was accepted and the policy issued, injuries occurring after the acceptance of the application and issuance of policy, though before its delivery to the assured, were covered by it. *Wylie v. U. S. Health & Acc. Ins. Co.*, 82 S. E. 402, 98 S. C. 273.
15. There being a conflict of testimony as to whether or not an insurance premium had been paid, that issue is for the jury. *Wylie v. U. S. Health & Acc. Ins. Co.*, 82 S. E. 402, 98 S. C. 273.
16. There being no provision in the contract requiring the beneficiary under a policy of insurance to pay the premium, the question whether she had ever paid it was irrelevant. *Wylie v. U. S. Health & Acc. Ins. Co.*, 82 S. E. 402, 98 S. C. 273.

INTEREST.

1. Interest is not recoverable on an open account where the contract does not expressly provide therefor. *Paris Mt. Water Co., v. Camperdown Mills*, 82 S. E. 417, 98 S. C. 304.

INTERSTATE COMMERCE.

1. The authority of Congress to regulate interstate and foreign commerce is supreme and unlimited, except by the Federal Constitution, and when Congress legislates upon any particular subject of such commerce, all conflicting State laws, whether statute or common law, affecting the same subject are thereby

superseded; but, in the absence of such legislation, the police power of the State remains unimpaired. *Varnville Furniture Co. v. Charleston & W. C. Ry. Co.*, 79 S. E. 700, 98 S. C. 63.

2. Penalties incurred under Civ. Code 1912, sec. 2573, prior to the enactment of the Carmack amendment to the interstate commerce law, are recoverable from carriers even if that section is superseded and annulled by such amendment. *Varnville Furniture Co. v. Charleston & W. C. Ry. Co.*, 79 S. E. 700, 98 S. C. 63.
3. Civ. Code 1912, sec. 2573, prescribing the penalty for the failure of carriers to adjust claims promptly, held not inconsistent with, or superseded by, the Carmack amendment to the interstate commerce law, and hence to be valid as applied to interstate commerce. *Id.*, 79 S. E. 700, 98 S. C. 63.
4. Civ. Code 1912, sec. 2573, and the Carmack amendment to the interstate commerce law held not inconsistent as to the carrier against which actions for loss or damage to property shall be brought, the Carmack amendment not requiring them to be brought against the initial carrier, and section 2573 not requiring them to be brought against the terminal carrier. *Id.*, 79 S. E. 700, 98 S. C. 63.
5. Carmack amendment to the interstate commerce law held to continue all rights and remedies for the redress of some specific wrong or injury, whether given by that act, by State statute, or by the common law, not inconsistent with the rules and regulations prescribed by that act. *Id.*, 79 S. E. 700, 98 S. C. 63.
6. Civ. Code 1912, sec. 2573, imposing a penalty for the failure of carriers to adjust claims for overcharges of freight, or injuries to property, promptly, held valid in the absence of action by Congress covering the same subject. *Varnville Furni-*

- ture Co. v. Charleston & W. C. Ry. Co.*, 79 S. E. 700, 98 S. C. 63.
7. Civ. Code 1912, sec. 2573, imposing a penalty for the failure of carriers to adjust claims for overcharges of freight, or injuries to property, promptly, held not to unlawfully regulate or unreasonably burden interstate commerce. *Varnville Furniture Co. v. Charleston & W. C. Ry. Co.*, 79 S. E. 700, 98 S. C. 63.
 8. Where plaintiff was injured while making up an interstate train his right to recover depended on the Federal Employers' Liability Act, which superseded provisions of the State Constitution as to assumed risk. *Bramlett v. Southern Ry. Co.*, 82 S. E. 501, 98 S. C. 819.
 9. Where a railroad employee engaged in interstate commerce leaves no dependent relatives so as to give a right of action for his death under the Federal Employers' Liability Act, there can be no recovery under a State statute giving a right of action to relatives whether dependent or not. *Jones v. Charleston & W. C. Ry. Co.*, 82 S. E. 415, 98 S. C. 197.
 10. The Carmack amendment, June 29, 1906, c. 3591, sec. 7, §4 Stat. 593 (U. S. Comp. St. Supp. 1911, p. 1807), to the interstate commerce act, February 4, 1887, c. 104, sec. 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 8169), imposing a liability for damage to goods shipped upon the initial carrier, and providing that it shall not deprive the owner of any right which he had under the existing law, does not deprive a consignee of his right to a penalty for failure of the terminal carrier to pay the damages to the shipment or to inform the consignee of which carrier caused the damage, given by act February 15, 1910 (26 Stat. at Large, p. 717, Civ. Code 1912, sec. 2572), since the two statutes refer to the liability of different carriers. *DuPre v. C. N. & L. R. R. Co.*, 79 S. E. 310, 98 S. C. 468.

ISSUES.

1. The rights of a purchaser entering into and remaining in possession of the land claiming under the contract to purchase are equitable and are triable by the Court and not by a jury. *Mitchell v. Hamilton*, 82 S. E. 425, 98 S. C. 289.
2. While legal and equitable issues may be disposed of in one suit, the legal must be submitted to a jury, while the equitable must be tried by the Court, unless issues are framed as provided by law. *Id.*, 82 S. E. 425, 98 S. C. 289.
3. Where a party desiring that certain issues be submitted to a jury, on appeal to the Circuit Court, fails to comply with Circuit Court rule 28 as to notice, his exceptions to the Court's failure to submit such issues to a jury will be overruled. *In re Williams' Estate*, 82 S. E. 402, 98 S. C. 211.
4. Where a dispute arises as to right to ride on the ticket presented, the conductor not having heeded the explanations given, or investigated them, but ejected the passenger, the reasonableness of the explanations is for the jury. *McKeown v. Southern Ry. Co.*, 82 S. E. 437, 98 S. C. 838.
5. There being a conflict of testimony as to terms of contract in question, and as to the assignment of the chose in action to plaintiff, it was error to direct verdict for plaintiff. *Gregory-Conder Mule Co. v. Roddey*, 78 S. E. 876, 98 S. C. 347.
6. In our Courts, if there is any evidence upon an issue it should be submitted to the jury. *Maybank & Co. v. Rogers*, 82 S. E. 422, 98 S. C. 279.
7. On motion for nonsuit, the evidence and all inferences from it must be taken most strongly against defendant, and where there is some evidence of every fact essential to a recovery, the motion must be denied. *Sturdy-*

- vin v. A. & C. A. L. R. R. Co.*, 82 S. E. 275; 98 S. C. 125.
8. Whether a railroad company was negligent in failing to provide handrails and running boards at the sides of the tender of switch engines, *held*, under the evidence, for the jury. *Sturdyvin v. A. & C. A. L. R. R. Co.*, 82 S. E. 422, 98 S. C. 125.
 9. There being a conflict of testimony as to whether or not an insurance premium had been paid, that issue is for the jury. *Wylie v. U. S. Health & Acc. Ins. Co.*, 82 S. E. 402, 98 S. C. 273.
 10. If there is no competent evidence to go to the jury a nonsuit should be granted. *Thornton v. S. A. L. Ry.*, 82 S. E. 483, 98 S. C. 348.

JUDGE.

1. A Circuit Judge at chambers in another circuit than the one in which action is pending, without notice to the adverse party or his attorney and without a showing that there is no resident or presiding Judge in that Circuit, has no right to set aside orders made by the Court in the cause. *Beckwith v. Martin*, 82 S. E. 414, 98 S. C. 188.

JUDGMENT.

See Execution.

1. A Circuit Judge has no power at chambers to set aside a judgment, that being a matter to be acted upon in Court. *Beckwith v. Martin*, 82 S. E. 414, 98 S. C. 188.
2. A judgment in claim and delivery, in which the right to damages for an excessive levy under a distress warrant was not litigated, was not *res judicata* as to such damages in an action for excessive distress, though the question might have been litigated in the first action. *Cannon v. Coz*, 82 S. E. 399, 98 S. C. 185.
3. The procedure prescribed by Code Civ. Proc. 1912, secs. 347-349, for the revival of an execution, must be taken within ten years after judgment. *First Nat. Bank v. Carolina Midland Warehouse Co.*, 82 S. E. 405, 98 S. C. 168.
4. In an action on an accident policy, where it appeared that a check for part of the policy had been delivered by the insurer's agent to insured before his death, but had not been cashed, a judgment in favor of the beneficiary should protect the agent of the insurer against the unpaid check. *Wylie v. United States Health & Accident Ins. Co.*, 82 S. E. 402, 98 S. C. 273.
5. A sentence by a magistrate of 24 hours imprisonment for a contempt of Court is excessive. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.

JUDICIAL SALES.

1. Petitioner's assignor, though entitled to one-third the net balance of the resale of property after a mortgage shall have been deducted, could not, before such resale, demand that any certain part of the proceeds be paid to her, she being the purchaser at the first sale, and the resale being at her risk. *Ex parte Holman*, 81 S. E. 518, 98 S. C. 97.
2. Where petitioner's assignor, though entitled to one-third the proceeds of a resale of property in litigation, could not demand any certain part of the proceeds until after such resale, neither could petitioner, the assignee; their rights being the same. *Id.*, 81 S. E. 518, 98 S. C. 97.

JURISDICTION.

1. Where a case is, by consent, marked "heard" in open Court, and referred to a referee to take and report the testimony to the presiding Judge, a decree by such Judge based on such report is to be regarded as rendered in open Court. *Lummas Gin Co. v. Counts*, 82 S. E. 391, 98 S. C. 186.

2. Under Const., art. I, sec. 17, providing that no person shall be held to answer for a crime except in the county where the crime shall have been committed, the right of a party to be tried in a county where the crime was committed is jurisdictional, and hence defendant could not be lawfully convicted in L. county for selling a mortgaged mule in C. county. *State v. McCoy*, 82 S. E. 280, 98 S. C. 133.
 3. A Judge in another Circuit than that in which a cause is pending, has no jurisdiction to make an order in such cause, without evidence to show that there is no Judge in the Circuit where cause is pending. *Beckwith v. Martin*, 82 S. E. 414, 98 S. C. 183.
 4. An order should not be made, after default has occurred, extending time within which to answer, without notice to plaintiff. *Ib.*, 82 S. E. 414, 98 S. C. 183.
 5. A judgment cannot be vacated or set aside at chambers. *Ib.*
 6. An order of one Circuit Judge cannot be reviewed, modified or changed by another Circuit Judge. *Beckwith v. Martin*, 82 S. E. 414, 98 S. C. 183.
 7. In a prosecution for unlawful entry on lands of another, the magistrate's Court is not deprived of jurisdiction by tender of issue as to title. *State v. Richardson*, 82 S. E. 353, 98 S. C. 147.
- See Corporations: Actions Against.*
Hayes v. S. A. L. Ry., 81 S. E. 1102, 98 S. C. 6.

JURY.

1. The rights of a purchaser entering into and remaining in possession of the land claiming under the contract to purchase are equitable and are triable by the Court and not by a jury. *Mitchell v. Hamilton*, 82 S. E. 425, 98 S. C. 289.
2. While legal and equitable issues may be disposed of in one suit, the legal must be submitted to a jury, while the equitable must be tried by the Court unless issues are framed as provided by law. *Id.*, 82 S. E. 425, 98 S. C. 289.
3. The Constitution guaranteeing accused in criminal cases the right of trial by jurors, it is error for a magistrate to require a defendant, demanding a jury, to pay the jurors; the inference from the absence of provision for payment of jurors being that they are to serve without pay. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
4. The refusal of a motion to permit a jury to leave the courthouse, and to inspect the locus where an injury occurred is within the discretion of the trial Judge, and no abuse of discretion is shown in this case. *Thornton v. Spartan Mills*, 82 S. E. 414, 98 S. C. 262.

LACHES.

1. Creditors having failed to institute a suit until 1910 to set aside certain alleged fraudulent conveyances executed in 1894 and 1896, respectively, held barred by laches. *Tucker v. Weathersbee*, 82 S. E. 638, 98 S. C. 402.

LANDLORD AND TENANT.

1. Evidence in an action under Civ. Code 1912, sec. 8520, for punitive damages for an excessive distress for rent, held to authorize submitting to the jury whether defendant acted in reckless disregard of plaintiff's rights. *Cannon v. Cox*, 82 S. E. 899, 98 S. C. 185.
2. Where the levy under a distress warrant is excessive, the person procuring the levy is liable as a trespasser *ab initio*. *Id.*, 82 S. E. 899, 98 S. C. 185.
3. In an action for actual and punitive damages for excessive distress for rent, evidence that defendant was reckless in ascertaining the amount due and distrained for an excessive sum is admissible to sustain the claim for punitive damages. *Id.*, 82 S. E. 899, 98 S. C. 185.

LIMITATION OF ACTIONS.

1. A suit to set aside alleged fraudulent conveyances is within the six-year statute of limitations (Code Civ. Proc. 1912, sec. 137, subd. 6). *Tucker v. Weathersbee*, 82 S. E. 638, 98 S. C. 402.
2. Where two actions for recovery of land were discontinued, a subsequent action against the same defendant by the same plaintiffs for partition, though defendant in possession has no interest in the land, is for the recovery of the land and cannot be maintained under the rule that one may not for the third time be brought into Court in ejectment. *Mitchum v. Shaw*, 82 S. E. 401, 98 S. C. 175.
3. A suit against executors for an accounting of decedent's acts as guardian for a minor is one to recover a "debt" within Civ. Code 1912, sec. 8962, and cannot be brought within 12 months from the death of decedent. *Beach v. Addison*, 82 S. E. 428, 98 S. C. 215.

See Adverse Possession.

LIMITATIONS OF ESTATES.

1. A deed from husband to wife, conveying the land to her "and the heirs of my body begotten in wedlock with my wife," held, when construed with the warranting part, which was to the wife "and her heirs as above stated and her heirs and assigns," to convey a fee conditional to the wife, so that the land, on her death without disposing of it, passed to her children begotten of the grantor. *Church v. Moody*, 82 S. E. 428, 98 S. C. 234.
2. Where land was conveyed to a woman and to her bodily heirs and assigns forever, she took a fee conditional, and might, at common law, upon the birth of lawful issue, convey the land in fee simple. *Crawford v. Masters*, 82 S. E. 798, 98 S. C. 458.
3. Though Civ. Code 1912, sec. 3562, making illegitimate children heirs of the mother, applies

to a previous conveyance of land to a woman and her bodily heirs, and enables her to convey a fee simple upon the birth of illegitimate issue, the statute is not retroactive. *Crawford v. Masters*, 82 S. E. 798, 98 S. C. 458.

4. Under Civ. Code 1912, sec. 3562, providing that any illegitimate child whose mother shall die intestate and possessed of real property shall be an heir to such property, a woman to whom a fee, conditional on the birth of bodily heirs was conveyed may, after the birth of illegitimate child, convey a fee simple. *Crawford v. Masters*, 82 S. E. 798, 98 S. C. 458.

LOGS AND LOGGING.

1. Under a contract providing that C. was not to cut or sell any live pine timber for five years, except with the written consent of K., and that, when sold or delivered, C. should pay K. a commission of 5 per cent. on all timber sold, K. was not entitled to a commission on timber sold more than five years after execution of the contract. *Keenan v. Matthews*, 82 S. E. 431, 98 S. C. 226.
2. In a suit for the forfeiture of a conveyance of standing timber on the ground that the purchaser and his assignee had not commenced to cut and remove the timber within a reasonable time, evidence that the purchaser and the assignee had consulted an attorney before the execution of the conveyance as to the legal effect thereof was inadmissible. *Minshew v. A. C. L. Corp.*, 81 S. E. 1027, 98 S. C. 8.
3. Where a conveyance of standing timber was silent as to when the purchaser should commence to cut and remove the timber, the cutting and removal must be within a reasonable time. *Minshew v. A. C. L. Corp.*, 81 S. E. 1027, 98 S. C. 8.
4. An assignee of a purchaser of standing timber is chargeable with knowledge of the proper legal construction of the conveyance silent as to time when the

- cutting and removal should commence. *Minshew v. A. C. L. Corp.*, 81 S. E. 1027, 98 S. C. 8.
5. Where a forfeiture of a conveyance of standing timber was sought on the ground that the purchaser and his assignee had not begun to cut and remove the timber within a reasonable time, evidence that the grantor at the time of the execution of the conveyance was led to believe by the purchaser that a mill would be erected in the near future near the timber sold was admissible as bearing on the question of reasonable time within which the timber should be cut and removed. *Minshew v. A. C. L. Corp.*, 81 S. E. 1027, 98 S. C. 8.
 6. A conveyance of standing timber silent as to the time when the purchaser should begin to cut and remove the timber, but providing that the time limit should be five years from the beginning of the cutting and removal, which might be extended on the payment by the purchaser of interest on the purchase price, calls for the beginning of the cutting and removal of the timber within a reasonable time, and, where the purchaser and his assignee failed for twelve years to begin to cut and remove the timber and did not offer to pay the interest on the price, a forfeiture of the conveyance was warranted. *Minshew v. A. C. L. Corp.*, 81 S. E. 1027, 98 S. C. 8.
 7. A vendor of standing timber may sue for a forfeiture of the conveyance based on the failure of the purchaser and his assignee to begin to cut and remove timber within a reasonable time, without first giving notice to the purchaser or assignee to begin to remove the timber pursuant to the conveyance silent as to the time when the cutting and removal should begin. *Minshew v. A. C. L. Corp.*, 82 S. E. 1027, 98 S. C. 8.
 8. A contract for the sale of standing timber silent as to the time when the purchaser should begin to cut and remove the timber,

but stipulating that the time limit should be five years from the time the purchaser begins the cutting and removal, subject to extensions from year to year on the payment by the purchaser of interest on the price, is not an absolute conveyance in fee, but is in the nature of a lease, and the purchaser failing to remove the timber within a reasonable time has no interest therein. *Minshew v. A. C. L. Corp.*, 82 S. E. 1027, 98 S. C. 8.

MAGISTRATES.

1. Code Civ. Proc. 1912, sec. 88, relative to answers in magistrates' Courts showing that the title to real estate is in question, held inapplicable to criminal cases, and the magistrate in such a case properly refused to countersign such an answer. *State v. Richardson*, 82 S. E. 353, 98 S. C. 147.
2. The Governor has no power to suspend a magistrate, without first giving him a reasonable opportunity to be heard on the charge of misconduct. *Sullivan v. King*, 82 S. E. 408, 98 S. C. 314.
3. The action of the Governor in suspending a magistrate, without giving him notice and an opportunity to be heard, after the magistrate made return and a rule to show cause and appeared in person and by attorney, is void. *Id.*, 82 S. E. 408, 98 S. C. 314.
4. An attorney filing an affidavit charging a magistrate with directing a constable to influence a juror, and with being prompted by malice and improper motives in his rulings, without stating the facts with such definiteness as would warrant the inference, if they were true, that the charge was well founded, is guilty of a contempt of Court. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
5. Rulings of a magistrate on a former trial, reviewable on appeal, do not afford basis for motion to obtain a change of venue on the ground of prejudice

- of the magistrate. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
6. A defendant in a criminal case in a magistrate's Court cannot be required to pay jury fees or costs on demanding a trial by jury, to which he is entitled under the Constitution. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
 7. It is improper for a magistrate to argue a cause on appeal, in support of the judgment rendered by him, and which should be considered upon the return made by him to the appellate tribunal. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.
 8. Under Cr. Code 1912, sec. 94, providing that the party appealing from a magistrate's Court shall serve a notice of appeal stating the ground thereof, section 95, requiring the magistrate to file in the office of the clerk of Court such notice with the record and statement of all proceedings in the case and the testimony in writing taken at the trial, and signed by the witnesses, and section 98, providing that the appeal shall be heard by the Court of General Sessions upon the grounds of exceptions made, and upon the papers thereinbefore required, without the examination of witnesses in such Court, affidavits submitted by accused when his appeal was heard in the Circuit Court, contradicting the magistrate's report of the testimony, constituted no part of the proceedings upon which the appeal was to be heard, and the Court properly refused to consider them. *State v. Richardson*, 82 S. E. 353, 98 S. C. 147.
 9. Code Civ. Proc. 1912, sec. 407, providing, relative to appeals to the Circuit Court from an inferior Court, that if the appeal is founded on an error of fact not affecting the merits of the action, and not within the knowledge of the magistrate, the Court may determine the alleged error of fact on affidavits, or, in its discretion upon examination of witnesses, does not apply to

criminal cases in view of section 8, which provided that that Code is divided into two parts, and that the first relates to Courts of justice and their jurisdiction, and the second to civil actions; section 407 being in the second part. *State v. Richardson*, 82 S. E. 353, 98 S. C. 147.

MANDAMUS.

1. A continuance is properly refused when asked to obtain time to move for a writ of mandamus, to which the party is not entitled, because of his remedy by appeal. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.

MASTER AND SERVANT.

1. In an action for the balance due under an employment contract, the only issue being whether plaintiff's compensation was to be based solely on commissions, or whether defendant undertook that it should not be less than a certain amount, evidence as to the salary plaintiff received after he quit defendant's service was properly excluded. *Crawford v. Rice & Hutchins Baltimore Co.*, 82 S. E. 278, 98 S. C. 121.
2. The duty of an employer to furnish reasonably safe appliances depends, not only on the service required, but also on how the service is customarily performed with the knowledge and acquiescence of the employer. *Sturdyvin v. Atlanta & C. Air Line Ry. Co.*, 82 S. E. 275, 98 S. C. 125.
3. Under the Constitution, the defense of assumption of risk is not available to a railroad company when sued by an employee for a personal injury. *Sturdyvin v. Atlanta & C. Air Line Ry. Co.*, following *Youngblood v. South Carolina & G. R. Co.*, 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824, 82 S. E. 275, 98 S. C. 125.
4. In an action against a railroad company for injuries to a brakeman while assisting in operating a switch engine, evidence held to support a finding that the negli-

- gent failure to provide a safe place to work was the proximate cause of the accident. *Sturdyvin v. Atlanta & C. Air Line Ry. Co.*, 82 S. E. 275, 98 S. C. 125.
5. The negligence of a railroad company in failing to provide handrails and running boards at the sides of the tender of switch engines cannot be determined conclusively by what other railroad companies do or fail to do, but the fact that two railroad systems had so placed handrails and running boards has some bearing on the issue. *Sturdyvin v. Atlanta & C. Air Line Ry. Co.*, 82 S. E. 275, 98 S. C. 125.
 6. In an action against a railroad company for injuries to a brakeman while assisting in operating a switch engine, evidence held to support a finding of negligent failure to provide a safe place to work. *Id.*, 82 S. E. 275, 98 S. C. 125.
 7. Whether a railroad company was negligent in failing to provide handrails and running boards at the sides of the tender of switch engines held for the jury. *Sturdyvin v. Atlanta & C. Air Line Ry. Co.*, 82 S. E. 275, 98 S. C. 125.
 8. It is not contributory negligence, as matter of law, for a brakeman assisting in operating a switch engine to get on or off a moving engine, unless the situation is such as to make the danger apparent to a man of ordinary prudence. *Sturdyvin v. Atlanta & C. Air Line Ry. Co.*, 82 S. E. 275, 98 S. C. 125.
 9. Whether a brakeman, injured while assisting in operating a switch engine, was guilty of contributory negligence in attempting to mount the engine while in motion held for the jury. *Id.*, 82 S. E. 275, 98 S. C. 125.
 10. In an action for the wrongful death of a locomotive fireman, killed when his engine was derailed at a burning trestle, where it appeared that immediately after another engine had passed over the trestle it was discovered to be on fire, testimony of a witness that he saw places near by where fire had been dropped is admissible as tending to show the origin of the fire. *Bennett v. Southern Ry.—Carolina Division*, 89 S. E. 710, 98 S. C. 42.
 11. In an action for the death of a locomotive fireman, who was killed when the engine was derailed at a burning trestle, evidence of the engineer's reputation for carefulness is inadmissible. *Bennett v. Southern Ry.—Carolina Division*, 79 S. E. 710, 98 S. C. 42.
 12. The Federal Employers' Liability Act being general in its terms, the rules of evidence as to the quantity of proof necessary to make out a *prima facie* case of negligence is that which prevails in the State where the action is brought. *Bennett v. Southern Ry.—Carolina Division*, 79 S. E. 710, 98 S. C. 42.
 13. The provisions of the Federal Employers' Liability Act (85 U. S. Stat. at Large 65, chap. 149, U. S. Comp. Stats. Supp. 1911, p. 1132) cover the entire subject of the liability of railroad companies to their employees while engaged in interstate commerce, and supersede the prior State law upon that subject. *Jones v. C. & W. C. Ry. Co.*, 82 S. E. 415, 98 S. C. 197.
 14. Testimony that the surviving brother of deceased had been for some time, and was still at time of trial, sick and unable to work does not show him to have been dependent on deceased within the meaning of the Federal Employers' Liability Act. *Jones v. C. & W. C. Ry. Co.*, 82 S. E. 415, 98 S. C. 197.
 15. Where a servant hired from month to month breaches his contract of employment, leaving during the month, he cannot recover upon a *quantum meruit* for services rendered. *Daly v. Jefferson Hotel Co.*, 82 S. E. 412, 98 S. C. 222.
 16. In an action by a servant for compensation for services rendered under a contract, which he

- breached, proof of the contract is not proof of the value of the services rendered which will support a recovery. *Daly v. Jefferson Hotel Co.*, 82 S. E. 412, 98 S. C. 222.
17. Evidence, on an issue whether an employee was discharged or voluntarily quit the master's service, held sufficient to show he was discharged. *Champion v. Hermitage Cotton Mills*, 82 S. E. 672, 98 S. C. 418.
18. One though paid by the piece, instead of by time, is a laborer for "wages," within Civ. Code 1912, sec. 3812, providing a penalty for failure to pay on demand, to a discharged laborer, the wages due him. *Champion v. Hermitage Cotton Mills*, 82 S. E. 672, 98 S. C. 418.
19. Where the servant of a railroad was run down in the yards, but there were no eyewitnesses to his death, it will not be presumed that he intended to commit suicide, and threw himself under the cars, but it will be presumed that he was attempting to carry out his duties with due care. *Thornton v. S. A. L. Ry.*, 82 S. E. 433, 98 S. C. 348.
20. Under the Federal Employers' Liability Act (act Feb. 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. St. Supp. 1911, p. 1322), a servant does not assume the risk of injuries occasioned by the master's negligence. *Thornton v. S. A. L. Ry.*, 82 S. E. 433, 98 S. C. 348.
21. An incidental remark in connection with charge on assumption of risks, "that does not mean the person assumes the risks of negligence" cannot reasonably be supposed to have affected the verdict, where the law with reference to that defense was fully covered in the general charge, and special instructions given on request of appellant. *Thornton v. Spartan Mills*, 82 S. E. 414, 98 S. C. 262.
22. It is not to be reasonably supposed that a reference to the policy of Congress as to the doctrine of contributory negligence affected the verdict, where the jury were instructed that they were bound by the law of this State, and if the evidence proved that plaintiff was guilty of contributory negligence, she could not recover. *Thornton v. Spartan Mills*, 82 S. E. 414, 98 S. C. 262.
23. Where a defective board on the end of an engine tender from which plaintiff fell, was referred to interchangeably as a "foot-board" and a "running board" by defendant's counsel, he was not entitled to a ruling that plaintiff was not within the Federal Employers' Liability Act, because such act does not apply to "foot-boards." *Bramlett v. Southern Ry. Co.*, 82 S. E. 501, 98 S. C. 319.
24. Whether a defective board on the tender of an engine on which plaintiff attempted to jump and was injured was a "running-board" within Federal Employers' Liability Act, prohibiting the use of defective running boards, was for the jury. *Bramlett v. Southern Ry. Co.*, 82 S. E. 501, 98 S. C. 319.

MORTGAGES.

1. Where a mortgagor agreed to convey part of his land to defendants upon their payment of part of the mortgage, and the agreement was recorded, a mortgage subsequently given is subject to the agreement. *Kirven v. Wilds*, 82 S. E. 673, 98 S. C. 468.
2. Where a mortgagor agreed to convey a portion of the land to defendants, they cannot complain that the mortgagee refused to assign the mortgage to a designated party upon their payment of the entire amount due. *Kirven v. Wilds*, 82 S. E. 673, 98 S. C. 463.
3. Where a mortgagor agreed that if defendants would make certain payments on the mortgage he would convey to them a portion of the land, they have rights which should be protected upon

foreclosure. *Kirven v. Wilds*, 82 S. E. 673, 98 S. C. 463.

4. A mortgagee may refuse to allow redemption of part of the mortgaged premises. *Kirven v. Wilds*, 82 S. E. 673, 98 S. C. 463.

MOTIONS.

See Continuance.

1. A Circuit Judge at chambers in another Circuit than the one in which action is pending, without notice to the adverse party or his attorney and without a showing that there is no resident or presiding Judge in that Circuit, has no right to set aside orders made by the Court in the cause. *Beckwith v. Martin*, 82 S. E. 414, 98 S. C. 188.

NEGLIGENCE.

See Carriers; Master and Servant.

1. Negligence may be established by circumstantial evidence. *Thornton v. Seaboard Air Line Ry.*, 82 S. E. 433, 98 S. C. 348.
2. Plaintiff's failure to prove one of the several acts of negligence alleged does not warrant the direction of a verdict for defendant. *Thornton v. Seaboard Air Line Ry.*, 82 S. E. 433, 98 S. C. 348.
3. Instruction that owner of warehouse, flooded by storm, was not liable for the consequences of a storm occurring only twice in a generation, *held* improper as a charge on the facts. *Carolina Rice Co. v. West Point Mill Co.*, 82 S. E. 679, 98 S. C. 476.
4. Instruction that a warehouseman, if a gratuitous bailee, "would only be liable for gross negligence, that would be for a conscious failure to use due care," *held* not erroneous, in the absence of any request to the Court to differentiate between gross negligence and a conscious failure to observe due care. *Carolina Rice Co. v. West Point Mill Co.*, 82 S. E. 679, 98 S. C. 476.
5. That the engineer of a train running backwards could not see decedent on the track in front

of the train was not negligence, where the conductor posted himself on the forward car to keep a lookout and signal the engineer of approaching danger. *Dix v. Atlantic Coast Line R. Co.*, 82 S. E. 798, 98 S. C. 492.

6. The conductor of a train running backwards in the absence of anything to indicate the contrary, *held* entitled to assume that decedent, who was on the track in front of the train, was in the possession of all his senses and would get out of the way. *Dix v. Atlantic Coast Line R. Co.*, 82 S. E. 798, 98 S. C. 492.
7. Where decedent, knowing that he was too deaf to hear approaching trains, went on defendant's railroad track in front of an approaching train in full view, and was struck and killed, notwithstanding the efforts of persons on the train to warn him of his danger, he was guilty of contributory negligence, and no recovery could be had for his death. *Dix v. Atlantic Coast Line R. Co.*, 82 S. E. 798, 98 S. C. 492.
8. That a train by which decedent was struck and killed was operated backwards at a reasonable speed and with a lookout on the front car did not constitute negligence *per se*. *Dix v. Atlantic Coast Line R. Co.*, 82 S. E. 798, 98 S. C. 492.
9. An eleemosynary corporation conducting a hospital for the care of the sick, some of whom are cared for freely, and others of whom pay fees for such care, more or less in accordance with their circumstances, all funds so received being devoted, along with gifts and bequests, to the maintenance, support, improvement and equipment of the hospital, is a public charity; and is not responsible to a patient for injuries resulting from the negligence of its servants selected with due care. *Lindler v. Columbia Hospital*, 81 S. E. 512, 98 S. C. 25.
10. The duty of an employer to furnish reasonably safe appli-

- ances depends, not only on the service required, but also on how the service is customarily performed with the knowledge and acquiescence of the employer. *Sturdyvin v. Atlanta & C. Air Line Ry. Co.*, 82 S. E. 275, 98 S. C. 125.
11. Under the Constitution, the defense of assumption of risk is not available to a railroad company when sued by an employee for a personal injury. *Sturdyvin v. Atlanta & C. Air Line Ry. Co.*, following *Youngblood v. South Carolina & G. R. Co.*, 60 S. C. 9, 88 S. E. 232, 85 Am. St. Rep. 824, 82 S. E. 275, 98 S. C. 125.
 12. In an action against a railroad company for injuries to a brakeman while assisting in operating a switch engine, evidence held to support a finding that the negligent failure to provide a safe place to work was the proximate cause of the accident. *Sturdyvin v. Atlanta & C. Air Line Ry. Co.*, 82 S. E. 275, 98 S. C. 125.
 18. The negligence of a railroad company in failing to provide handrails and running boards at the sides of the tender of switch engines cannot be determined conclusively by what other railroad companies do or fail to do, but the fact that two railroad systems had so placed handrails and running boards has some bearing on the issue. *Sturdyvin v. Atlanta & C. Air Line Ry. Co.*, 82 S. E. 275, 98 S. C. 125.
 14. In an action against a railroad company for injuries to a brakeman while assisting in operating a switch engine, evidence held to support a finding of negligent failure to provide a safe place to work. *Id.*, 82 S. E. 275, 98 S. C. 125.
 15. Whether a railroad company was negligent in failing to provide handrails and running boards at the sides of the tender of switch engines held for the jury. *Sturdyvin v. Atlanta & C. Air Line Ry. Co.*, 82 S. E. 275, 98 S. C. 125.
 16. It is not contributory negligence, as matter of law, for a brakeman assisting in operating a switch engine to get on or off a moving engine, unless the situation is such as to make the danger apparent to a man of ordinary prudence. *Sturdyvin v. Atlanta & C. Air Line Ry. Co.*, 82 S. E. 275, 98 S. C. 125.
 17. Whether a brakeman, injured while assisting in operating a switch engine, was guilty of contributory negligence in attempting to mount the engine while in motion held for the jury. *Id.*, 82 S. E. 275, 98 S. C. 125.
 18. Warehouseman held to have burden of proving that damage to goods did not result from his negligence, whether the bailment be for hire or gratuitous. *Carolina Rice Co. v. West Point Mill Co.*, 82 S. E. 679, 98 S. C. 476.
 19. In action for damage to rice from a storm which flooded the warehouse in which it was stored, instruction held to make it sufficiently clear that, to be available as a defense, an act of God must be the entire cause of the loss. *Id.*, 82 S. E. 679, 98 S. C. 476.
 20. What a warehouseman chooses to do with his own property, or what risks he may assume in connection therewith, is not the test of his legal obligation to the property of the bailor. *Carolina Rice Co. v. West Point Mill Co.*, 82 S. E. 679, 98 S. C. 476.

NEW TRIALS.

1. Alleged errors not presented to the trial Court in the motion for new trial will not be considered on appeal. *Crawford v. Rice & Hutchins Baltimore Co.*, 82 S. E. 273, 98 S. C. 121.
2. Where on appeal a judgment of a magistrate was reversed and new trial ordered for error in the findings of fact, the order of the Circuit Court is not appealable. *Wray v. Atlantic Coast Line R. Co.*, 82 S. E. 412, 98 S. C. 278.
3. In an action against a corporation and its agent, where the jury found against the corpora-

- tion alone, an order granting plaintiff a new trial as against the agent is not appealable, because if the Supreme Court should decide there was no error in granting the new trial, it could not render judgment absolute upon the right of the agent. *Nunnamaker v. Smith's*, 82 S. E. 675, 98 S. C. 466.
4. An exception to the denial of a new trial will be overruled, where the record does not disclose the grounds of the motion and where the exception was not argued. *Mitchell v. Hamilton*, 82 S. E. 425, 98 S. C. 289.
 5. Where a trial Judge not being satisfied with the proof as to the damages, granted a new trial, the order was not appealable; the actual damages not having been determined so as to enable the Supreme Court to give judgment absolute. *Lott v. Southern Ry. Co.*, 82 S. E. 795, 98 S. C. 170.
 6. On appeal by plaintiff from order granting a new trial, no error being found in the order, judgment absolute will be rendered against him, and the action dismissed. *Planters Oil Co. v. Lightsey*, 81 S. E. 1102, 98 S. C. 3.
 7. The Court exercises its discretion in determining whether there is sufficient evidence to support the verdict. *Bennett v. So. Ry.—Car. Div.*, 79 S. E. 710, 98 S. C. 42.
- See Appeal and Error. Bennett v. So. Ry.—Car. Div.*, 79 S. E. 710, 98 S. C. 42.

NONSUIT.

See Issues.

1. If there is any evidence in favor of a party, the Judge cannot direct a verdict against him. *Maybank & Co. v. Rogers*, 82 S. E. 422, 98 S. C. 279; *Bennett v. So. Ry.—Car. Div.*, 79 S. E. 710, 98 S. C. 42; *Car. Rice Co. v. W. P. Mills Co.*, 82 S. E. 679, 98 S. C. 476; *Seacoast Timber Co. v. Thomas*, 82 S. E. 274; 98 S. C. 111.
2. If there is no competent evidence to go to the jury, a nonsuit should be granted. *Thornton v. Seaboard Air Line Ry.*, 82 S. E. 483, 98 S. C. 348.
3. On motion for nonsuit the evidence and all inferences from it must be taken most strongly against defendant, and where there is some evidence of every fact essential to a recovery, the motion must be denied. *Sturdyvin v. Atlanta & C. Air Line Ry. Co.*, 82 S. E. 275, 98 S. C. 125.
4. Where a railroad work train, on which an outlook was kept by the conductor for persons on the track, gave warning of its approach to a boy, employed by an independent contractor engaged in doubling the track, to carry water for the construction gang, at a point on the track not used as a walkway by either the construction gang or others, as soon as it discovered that he had not seen or heard the train, and in time for him to get off the track, if he had been able to hear the warning, there being nothing to indicate that the boy was not in possession of all his senses until too late to avoid a collision, held there was no evidence of negligence on the part of the railroad company, and a nonsuit should have been granted in an action against it by the administratrix of the boy to recover for damages arising from his death in a collision with the train. *Dix v. A. C. L. R. R. Co.*, 82 S. E. 798, 98 S. C. 492.

NOTICE.

See McKeown v. So. Ry. Co., 82 S. E. 487, 98 S. C. 388; *Tucker v. Weathersbee*, 82 S. E. 688, 98 S. C. 402.

OFFICERS.

1. The Governor has no power to suspend a magistrate, without first giving him a reasonable opportunity to be heard on the charge of misconduct. *Sullivan v. King*, 82 S. E. 408, 98 S. C. 314.

2. The action of the Governor in suspending a magistrate, without giving him notice and an opportunity to be heard, after the magistrate made return and a rule to show cause and appeared in person and by attorney, is void. *Id.*, 82 S. E. 408, 98 S. C. 814.
3. Under Civ. Code 1912, sec. 1528, the sheriff of Barnwell county cannot recover the fees prescribed by section 4230, since the enactment of section 1486, awarding him a regular salary. *Morris v. Buist*, 82 S. E. 675, 98 S. C. 415.
4. Where the regular solicitor was sick, the Court may appoint an acting solicitor, and an indictment signed by him as such is not void. *State v. Smalls*, 82 S. E. 421, 98 S. C. 297.
See Coroners. State v. Griffin, 82 S. E. 254, 98 S. C. 105.

PARTIES.

1. An order allowing plaintiff to amend the summons and complaint by substituting a third person as defendant is in effect a dismissal as to defendant named. *Hambricht v. Southern Ry.—Carolina Division*, 82 S. E. 416, 98 S. C. 219.
2. A complaint seeking partition, but which alleges that the title is in other parties to the action than defendant in possession, does not state a cause of action in partition, but the only remedy of the plaintiffs is by ejectment. *Mitchum v. Shaw*, 82 S. E. 401, 98 S. C. 175.

PARTITION.

See Recovery of Real Property, pars. 5 and 6; *Mitchum v. Shaw*, 82 S. E. 401, 98 S. C. 175.

PENALTIES.

1. Actions for recovery of. *See Andrews v. A. C. L. R. R. Co.*, 82 S. E. 403, 98 S. C. 212; *DuPre v. C., N. & L. R. R. Co.*, 79 S. E. 810, 98 S. C. 468; *Champion v. Hermitage Mills*, 82 S. E. 672, 98 S. C. 418; *Varnville Furni-*

ture Co. v. C. & W. C. Ry. Co., 79 S. E. 700, 98 S. C. 63.

PLEADING.

See Corporations; Gaming.

1. A Circuit Judge at chambers in another Circuit than the one in which action is pending, without notice to the adverse party or his attorney and without a showing that there is no resident or presiding Judge in that Circuit, has no right to grant an extension of time to answer. *Beckwith v. Martin*, 82 S. E. 414, 98 S. C. 183.
2. Under Code Civ. Proc. 1912, sec. 219, where the answer admitted and denied the allegations in specified paragraphs of the complaint, the allegations of the paragraphs not specified would be taken as true. *Lummas Cotton Gin Co. v. Counts*, 82 S. E. 391, 98 S. C. 186.
4. A demurrer admits the allegations of a pleading attacked. *Gwathney v. Burgess*, 82 S. E. 394, 98 S. C. 152.
5. As plaintiff, in an action on an account stated, need not prove all of the items, as he must in case of an open account, and may, under Civ. Code 1912, sec. 2516, recover interest, a third cause of action on account stated, joined with two previous causes of action which stated practically the same facts, but sought recovery on an open account, will not be stricken as redundant. *Gwathney v. Burgess*, 82 S. E. 394, 98 S. C. 152.
6. Under Code Civ. Proc. 1912, sec. 218, authorizing the joinder in the same complaint of several causes of action upon contract, an action on open account may be joined with an action on account stated. *Gwathney v. Burgess*, 82 S. E. 394, 98 S. C. 152.
7. Allegation as to defendant's lack of knowledge or information respecting plaintiff's corporate existence, held merely a general denial, which did not put plaintiff's corporate existence or capacity to sue in issue. *Lum-*

mus Cotton Gin Co. v. Counts, 82 S. E. 891, 98 S. C. 136.

8. An action by one of several alleged tenants in common against a third party in possession of lands claiming adversely to them, and the other alleged cotenants with plaintiff, to eject said third party, and partition the land among the cotenants, is an action against said third party for recovery of possession of land. *Mitchum v. Shaw*, 82 S. E. 401, 98 S. C. 175.
9. An order permitting an amendment to substitute a third party as defendant instead of the original defendant, is in effect a dismissal of the action against the original defendant, and not prejudicial to its rights, and an appeal by the original defendant will not lie from such order, except as to costs. *Hambricht v. So. Ry.—Car. Div.*, 82 S. E. 416, 98 S. C. 219.

PRINCIPAL AND AGENT.

1. An agent to make a contract is not authorized to rescind or vary the rights of his principal, unless special authority thereto is shown. *Maybank & Co. v. Rogers*, 82 S. E. 422, 98 S. C. 279.
2. Where defendant failed to furnish cotton brokers with whom he had transactions with sufficient funds to indemnify themselves on purchases and sales made for his benefit, the brokers were not bound to carry his contracts to maturity; it being the duty of the principal to indemnify his agent. *Gwathney v. Burgiss*, 82 S. E. 394, 98 S. C. 152.

PRESUMPTIONS.

1. Whether testimony is sufficient to rebut the presumption of negligence arising in case of live stock killed on railroad track is an issue for the jury. *Matthews v. A. C. L. R. R. Co.*, 82 S. E. —, 98 S. C. 204.
2. There is no presumption of law that any witness will tell the truth, and a charge that such presumption exists is error.

State v. Riley, 82 S. E. 621, 98 S. C. 386.

PROCESS.

1. Where the parties in claim and delivery, the venue of which was laid in C., resided in M., process was properly served in M. by one not a party to the action under Code Civ. Proc. 1912, sec. 183. *Easterling v. Odom*, 82 S. E. 407, 98 S. C. 171.

PUBLIC SERVICE CORPORATIONS.

1. Where a water company is guilty of any illegal discrimination by charging certain consumers a less rate than others, the latter may not sue to compel the company to grant the less rate. *Paris Mountain Water Co. v. Camperdown Mills*, 82 S. E. 417, 98 S. C. 304.
2. A water company furnishing water to a consumer pursuant to a contract fixing the price, but silent on the subject of interest, held not entitled to interest on water bills. *Id.*, 82 S. E. 417, 98 S. C. 304.

QUANTUM MERUIT.

1. A recovery upon *quantum meruit* cannot be had for services rendered, in the absence of testimony as to the value of the services. *Daly v. Jefferson Hotel Co.*, 82 S. E. 412, 98 S. C. 222.
2. An employee cannot recover upon *quantum meruit* for services rendered under a contract where, without justification or excuse, he abandons the contract before the end of the term. *Daly v. Jefferson Hotel Co.*, 82 S. E. 412, 98 S. C. 222.

RAILROADS.

1. That the engineer of a train running backwards could not see decedent on the track in front of the train was not negligence, where the conductor posted himself on the forward car to keep a lookout and signal the engineer of approaching

- danger. *Dix v. Atlantic Coast Line R. Co.*, 82 S. E. 798, 98 S. C. 492.
2. The conductor of a train running backwards in the absence of anything to indicate the contrary, held entitled to assume that decedent, who was on the track in front of the train, was in the possession of all his senses and would get out of the way. *Dix v. Atlantic Coast Line R. Co.*, 82 S. E. 798, 98 S. C. 492.
 3. Where decedent knowing that he was too deaf to hear approaching trains, went on defendant's railroad track in front of an approaching train in full view, and was struck and killed, notwithstanding the efforts of persons on the train to warn him of his danger, he was guilty of contributory negligence, and no recovery could be had for his death. *Dix v. Atlantic Coast Line R. Co.*, 82 S. E. 798, 98 S. C. 492.
 4. That a train by which decedent was struck and killed was operated backwards at a reasonable speed and with a lookout on the front car did not constitute negligence *per se*. *Dix v. Atlantic Coast Line R. Co.*, 82 S. E. 798, 98 S. C. 492.
 5. Whether testimony is sufficient to rebut the presumption of negligence arising in case of live stock killed on railroad track is an issue for the jury. *Matthews v. A. C. L. R. R. Co.*, 82 S. E. —, 98 S. C. 204.
- See, also, Carriers of Goods; Carriers of Passengers; Federal Employers' Liability Act; Federal Safety Appliance Act; Master and Servant, and Street Railways; Venue.*

RECOVERY OF REAL PROPERTY.

1. In an action for the possession of land, a deed executed by a third person to plaintiffs for the land was admissible in evidence to show that plaintiffs or their ancestors entered under color of

title. *Mitchell v. Hamilton*, 82 S. E. 425, 98 S. C. 289.

2. A grantee whose title fails cannot recover the land as against a hostile claimant, where the consideration named in the deed has been repaid to him by the grantor. *Church v. Moody*, 82 S. E. 428, 98 S. C. 234.
3. Evidence showing a chain of title in plaintiffs, coupled with testimony that their predecessors in title paid taxes on the land and had possession for more than 40 years, makes out a *prima facie* case of ownership raising a presumption that plaintiffs' predecessors took under a grant from the State. *Seacoast Timber Co. v. Thomas*, 82 S. E. 274, 98 S. C. 111.
4. In an action to recover land, where neither party deranged title from the State, but both introduced evidence tending to raise the presumption of a grant, the question of title is for the jury. *Seacoast Timber Co. v. Thomas*, 82 S. E. 274, 98 S. C. 111.
5. A complaint seeking partition, but which alleges that the title is in other parties to the action than defendant in possession, does not state a cause of action in partition, but the only remedy of the plaintiffs is by ejectment. *Mitchum v. Shaw*, 82 S. E. 401, 98 S. C. 175.
6. Where two actions for recovery of land were discontinued, a subsequent action against the same defendant by the same plaintiffs for partition, though defendant in possession has no interest in the land, is for the recovery of the land and cannot be maintained under the rule that one may not for the third time be brought into Court in ejectment. *Mitchum v. Shaw*, 82 S. E. 401, 98 S. C. 175.

REFERENCE.

See Appeal and Error.

1. Where the parties, agreed when a case was called on the last day of the term, that it should be marked "heard" and referred

to a referee to take and report testimony, the decree was to be upon the testimony so taken and reported as if actually heard in open Court, and decision reserved. *Lummas Cotton Gin Co. v. Counts*, 82 S. E. 391, 98 S. C. 186.

2. Where defendant consented to a reference to hear and report, held that he could not complain that this was done; that four days' notice of the reference was not given; that the referee filed his report with the Judge instead of with the clerk, and that the Judge thereon entered judgment after the adjournment of Court. *Lummas Cotton Gin Co. v. Counts*, 82 S. E. 391, 98 S. C. 186.

RES JUDICATA.

1. The defense of *res judicata* comes too late, when not plead, and when presented to the Court for the first time on motion for a new trial. *Cannon v. Cox*, 82 S. E. 399, 98 S. C. 185.
2. A judgment on a different cause of action is not *res judicata* in a subsequent action where the issues involved in the second action were not necessarily involved, and were not actually litigated, in the first action. *Cannon v. Cox*, 82 S. E. 399, 98 S. C. 185.

RULES OF COURT.

1. Where counsel cannot agree upon a correct synopsis of the evidence, if the matter be submitted to the Circuit Judge, his decision on that point is subject to appeal. *Twiggs v. Williams*, 82 S. E. 676, 98 S. C. 431.
2. Unless the printed case containing the proceedings at trial be prepared in accordance with the rules, and immaterial matters be omitted, the Supreme Court will be justified in dismissing the appeal. *Twiggs v. Williams*, 82 S. E. 676, 98 S. C. 431.
3. In preparing the printed case for appeal, testimony should be

set out in narrative form, without repetition, save when the question and answers are necessary to elucidate the point to be decided, or it is desired to call attention to the exact language of the witness. *Twiggs v. Williams*, 82 S. E. 676, 98 S. C. 431.

4. In preparing the printed case, only the substance of instruments in writing should be set out, unless a construction is desired, and, where a construction is necessary, only the part pertinent need be set out in full; the remainder being stated. *Twiggs v. Williams*, 82 S. E. 676, 98 S. C. 431.
5. Where counsel cannot agree upon a correct synopsis of the evidence, the matter should be submitted to the Circuit Judge. *Twiggs v. Williams*, 82 S. E. 676, 98 S. C. 431.
6. Where the attorneys cannot agree on the case for appeal, the case must be settled by the trial Court, and appellant must prepare the case as fixed for him, and where he is dissatisfied with the ruling of the Court he must except and question the correctness thereof when the case is heard on the merits. *Greer v. Keaton*, 82 S. E. 424, 98 S. C. 192.
7. The rule governing preparation of the case on appeal, restated, and the bar warned that cases not prepared in accordance with the rule, are not entitled to consideration. *Twiggs v. Williams*, 82 S. E. 676, 98 S. C. 431.
8. The right of plaintiff to open and close arguments to jury should not be denied, unless waived. *Barnett v. Gottlieb*, 82 S. E. 406, 98 S. C. 180.
9. The Court may waive the rule as to number of counsel participating in conduct of examination of witness. *Barnett v. Gottlieb*, 82 S. C. 406, 98 S. C. 180.
10. An agreement that a cause be marked "heard," and referred to a referee to take and report the testimony for the purpose of such hearing, made orally,

in open Court and noted by the Judge, is binding upon the parties. *Lummas Cotton Gin Co. v. Counts*, 82 S. E. 391, 98 S. C. 186.

SALES.

See Vendor and Purchaser.

1. Where a seller billed goods to be delivered f. o. b. at a named point in its own name, and refused to release them until payment of a draft with bill of lading attached, though the railroad declined to deliver until prepayment of freight, and the buyer refused to honor the draft before delivery, although offering to pay the freight, the buyer is not liable; the delivery to the railroad company not being a delivery to him. *Planters Oil Co. v. Lightsey*, 81 S. E. 1102, 98 S. C. 3.
2. The delivery of property by one in satisfaction of a debt due by another is a valid sale, and not within the inhibition of the statute of frauds. *Rogers v. Felder*, 82 S. E. 436, 98 S. C. 178.
3. *See, As to Sales for Future Delivery.* *Gwathney v. Burgess*, 82 S. E. 394, 98 S. C. 152; *Maybank & Co. v. Rogers*, 82 S. E. 422, 98 S. C. 279.
4. *As to Sales of Timber; Logs and Logging.* *Minshew v. A. C. L. Corporation*, 81 S. E. 1027, 98 S. C. 8.
5. *As to Commissions on Sales.* *Keenan v. Matthews*, 82 S. E. 431, 98 S. C. 226.

SALES FOR FUTURE DELIVERY.

1. In an action for the seller's failure to deliver cotton sold under a contract for future delivery, invalid unless both parties intended an actual delivery, evidence that the seller, while the agent of another, had made previous contracts with the buyer's agent, under which actual delivery had been made, held admissible as evidence of intention. *Maybank & Co. v.*

Rogers, 82 S. E. 422, 98 S. C. 279.

2. Under Civ. Code 1912, secs. 3421-3423, providing that contracts for the future sale of cotton shall be void unless both parties, when making it, intend that it shall be actually delivered and received, and putting the burden of showing such intention on the plaintiff, held, that the buyer was required to show both its own intention to receive and the seller's intention to deliver, and that the contract itself was not sufficient. *Id.*, 82 S. E. 422, 98 S. C. 279.
3. In an action on contracts for the future delivery of cotton, unlawful unless the buyer and the seller, at the time of the contract, intended that the buyer should receive and the seller should deliver, where there was some evidence to sustain the buyer's burden of proving such intention, the question of intention was for the jury. *Maybank & Co. v. Rogers*, 82 S. E. 422, 98 S. C. 279.
4. That brokers, through whom defendant bought and sold cotton for future delivery, closed out his transactions upon his failure to deposit sufficient margins, does not show that defendant had no intention of receiving and delivering the actual cotton, thus rendering the contract bad under Civ. Code 1912, sec. 3421, denouncing dealings in futures. *Gwathney v. Burgess*, 82 S. E. 394, 98 S. C. 152.
5. Under Civ. Code 1912, sec. 3421, a broker who entered into contracts on behalf of defendant for the future purchase and sale of cotton cannot recover thereon, where defendant had no intention of actually receiving or delivering the cotton. *Id.*, 82 S. E. 394, 98 S. C. 152.
6. A complaint of a broker seeking to recover losses on purchases and sales of cotton for future delivery, made on behalf of a customer, stated a cause of action, where different inferences as to whether the transac-

tions were dealings in futures, denounced by Civ. Code 1912, sec. 8421, could be drawn from its averments. *Gwathney v. Burgess*, 82 S. E. 394, 98 S. C. 152.

SHERIFFS AND CONSTABLES.

1. Under Civ. Code 1912, sec. 1528, the sheriff of Barnwell county cannot recover the fees prescribed by section 4230, since the enactment of section 1486, awarding him a regular salary. *Morris v. Buist*, 82 S. E. 675, 98 S. C. 415.

SLANDER.

1. Appeal from order granting new trial in action for, dismissed. *Nunnemaker v. Smith's*, 82 S. E. 675, 98 S. C. 466.

SPECIFIC PERFORMANCE.

1. Where complainant was not entitled to specific performance, error could not be based on failure to retain the bill for the assessment of damages for breach of contract, in the absence of a request therefor. *Elliott v. Page*, 82 S. E. 620, 98 S. C. 400.
2. A plaintiff having elected to ask for the specific performance of a contract, cannot, after being denied that relief on the hearing of the cause on its merits, be allowed to renew the contest in order to assert a right to damage for an alleged breach of the contract. *Elliott v. Page*, 82 S. E. 620, 98 S. C. 400.
3. Where a mortgagor agreed that if defendant would make certain payments on the mortgage he would convey to them a portion of the land, they have rights which may be enforced by specific performance, and should be protected upon foreclosure. *Kirzen v. Wilds*, 82 S. E. 673, 98 S. C. 463.
4. Where a purchaser entered into and remained in possession claiming under the contract to

purchase, his rights to the land were equitable as against the vendor or a subsequent purchaser, and might be enforced by specific performance. *Mitchell v. Hamilton*, 82 S. E. 620, 98 S. C. 289.

STATUTE OF DISTRIBUTIONS.

See Illegitimates. Crawford v. Masters, 82 S. E. 793, 98 S. C. 468.

STREET RAILWAYS.

1. A street railroad company has a right to make and enforce reasonable rules. *Taylor v. Spartanburg Ry., Gas & Electric Co.*, 82 S. E. 404, 98 S. C. 206.
2. A rule of a street car company requiring a person holding a transfer to take the next succeeding car at the point designated on the transfer, held a reasonable protection against fraud. *Taylor v. Spartanburg Ry., Gas & Electric Co.*, 82 S. E. 404, 98 S. C. 206.
3. A street car company whose regulations required a person holding a transfer to take the next succeeding car at the point designated was justified in refusing transfers of passengers boarding the car 100 yards from such point, and, on their refusal to pay fare, in ejecting them. *Taylor v. Spartanburg Ry., Gas & Electric Co.*, 82 S. E. 404, 98 S. C. 206.

TENDER.

1. Where justice requires a claimant to make good his tender to return the consideration received for a void release, the Court may require him to return such consideration, or give credit for the amount thereof on the judgment as a condition for affirmance of such judgment. *Wylie v. U. S. Health & Acc. Ins. Co.*, 82 S. E. 402, 98 S. C. 278.

TIMBER.

See Logs and Logging. Minshew v. A. C. L. Corporation, 81 S. E.

1027, 98 S. C. 8; *Keenan v. Matthews*, 82 S. E. 431, 98 S. C. 226.

TRIAL.

See Continuance; Costs; Criminal Law; Death; Insurance; Landlord and Tenant; Reference; Charge; Issues; Nonsuit; Venue; Jury.

1. Defendant *held* not entitled to complain that the cause was called for trial before cases ahead of it on the calendar had been tried and disposed of. *Lumms Cotton Gin Co. v. Counts*, 82 S. E. 391, 98 S. C. 186.
2. Defendant *held* to have waived any error respecting the calling of his case out of its order on the docket after the usual hour for adjournment on the last day of the term, where he agreed that the case should be marked as heard and referred to a referee. *Id.*, 82 S. E. 391, 98 S. C. 136.
3. The Court must enforce rule 59, relating to the right to open and close, and the burden is on the successful party wrongfully permitted to close the argument to show waiver of the right by the defeated party. *Barnett v. Gottlieb*, 82 S. E. 406, 98 S. C. 180.
4. The trial Judge may in his discretion dispense with the requirements of rule 31, which provides that only one counsel on each side shall examine or cross-examine a witness. *Barnett v. Gottlieb*, 82 S. E. 406, 98 S. C. 180.
5. In an action for excessive distress for rent, an instruction that the jury might give punitive damages for gross negligence of defendant in keeping his accounts, *held* not erroneous, where the Court charged that he would not be so liable unless so grossly negligent that the law would impute willfulness. *Cannon v. Cox*, 82 S. E. 399, 98 S. C. 185.
6. Misconduct of counsel in argument to the jury is not available for error unless the Court is asked to rule thereon and to instruct the jury to disregard the same. *Crawford v. Rice & Hutchins Baltimore Co.*, 82 S. E. 273, 98 S. C. 121.
7. Argument of counsel on testimony that had been stricken was not error, where the argument was immediately terminated as soon as counsel's attention was called to the fact that the testimony had been stricken. *Crawford v. Rice & Hutchins Baltimore Co.*, 82 S. E. 273, 98 S. C. 121.
8. On motion for nonsuit the evidence and all inferences from it must be taken most strongly against defendant, and where there is some evidence of every fact essential to a recovery, the motion must be denied. *Sturdyvin v. Atlanta & C. Air Line Ry. Co.*, 82 S. E. 275, 98 S. C. 125.
9. The hours of the sessions of the Court and the granting or refusing of motions for a continuance, either within or beyond the term, are in the discretion of the trial Court. *Lumms Cotton Gin Co. v. Counts*, 82 S. E. 391, 98 S. C. 136.
10. Where the parties, agreed when a case was called on the last day of the term, that it should be marked "heard" and referred to a referee to take and report testimony, the decree was to be upon the testimony so taken and reported as if actually heard in open Court, and decision reserved. *Lumms Cotton Gin Co. v. Counts*, 82 S. E. 391, 98 S. C. 136.
11. Where defendant consented to a reference to hear and report, *held*, that he could not complain that this was done; that four days' notice of the reference was not given; that the referee filed his report with the Judge instead of with the clerk, and that the Judge thereon entered judgment after the adjournment of Court. *Lumms Cotton Gin Co. v. Counts*, 82 S. E. 391, 98 S. C. 136.

12. To hold refusal of defendant's request for a view by the jury of the premises where plaintiff was injured by machinery to be error, the appellate Court must be satisfied that the refusal was an abuse of discretion. *Thorn-ton v. Spartan Mills*, 82 S. E. 414, 98 S. C. 262.

TRUSTS.

1. Where certain real property was conveyed by the vendor to a debtor's wife and she paid the price out of her own separate funds, there was no trust in favor of the husband which could be enforced by his creditors. *Tucker v. Weathersbee*, 82 S. E. 638, 98 S. C. 402.
2. An unincorporated religious association may take under a will as trustee, property to be used as an endowment fund for a church and to keep up certain graves. *Drennan v. Agurs*, 82 S. E. 622, 98 S. C. 391.
3. The direction that a portion of funds bequeathed, be used for keeping up certain graves, and balance used as an endowment fund for a church, creates a precatory trust to be administered by trustee in the exercise of its discretion. *Drennan v. Agurs*, 82 S. E. 622, 98 S. C. 391.
4. Where a mortgagor agreed to convey a portion of the land to defendants, they cannot complain that the mortgagee refused to assign the mortgage to a designated party upon their payment of the entire amount due. *Kirven v. Wilds*, 82 S. E. 673, 98 S. C. 468.
5. Where a mortgagor agreed that if defendants would make certain payments on the mortgage he would convey to them a portion of the land, they have rights which should be protected upon foreclosure. *Kirven v. Wilds*, 82 S. E. 673, 98 S. C. 463.
6. As to sales of timber. *See Logs and Logging. Minshew v. A. C. L. Corporation*, 81 S. E. 1027, 98 S. C. 8.

VENUE.

1. Under Const., art. I, sec. 17, providing for prosecution for crime only in the county where it was committed, accused could not be lawfully convicted in L. county for the sale of a mortgaged mule in C. county. *State v. McCoy*, 82 S. E. 280, 98 S. C. 133.
2. Where the venue in claim and delivery of certain cattle was laid in C., and was changed to M., an order directing the sheriff of M. to seize and immediately deliver the cattle was not an order involving the merits, and could not be made the basis of an appeal under Code Civ. Proc. 1912, sec. 11, par. 1. *Easterling v. Odom*. 82 S. E. 407, 98 S. C. 133.

UNINCORPORATED ASSO- CIATION.

See Drennan v. Agurs, 82 S. E. 622, 98 S. C. 391.

VENDOR AND PURCHASER.

See Jury; Sales.

1. Where a purchaser entered into and remained in possession claiming under the contract to purchase, his rights to the land were equitable as against the vendor or a subsequent purchaser. *Mitchell v. Hamilton*, 82 S. E. 425, 98 S. C. 289.
2. Where defendant sold plaintiff certain land according to specified boundaries, represented to contain 20 acres, that the tract only contained 12.4 acres did not constitute such a gross de-

8. A foreign corporation owning and operating a line of railroad in this State is a resident of a county in which such railroad is situate, and in which it maintains offices and agents for the transaction of such business; and may, under Code Civ. Proc., sec. 174, be sued in such county jointly with a resident of another county of the State. *Hayes v. S. A. L. Ry.*, 81 S. E. 1102, 98 S. C. 6.
4. An affidavit to obtain a change of venue, must state the facts relied upon as ground of motion, and, if, upon information and belief, also the sources of information and grounds of belief, with such definiteness, particularity and certainty, as would afford the basis of an indictment for perjury, if the affidavit be false, and would enable the Court to determine their sufficiency. *State v. Barnett*, 82 S. E. 795, 98 S. C. 422.

WAGES.

1. Payment of. *See Champion v. Hermitage Cotton Mills*, 82 S. E. 672, 98 S. C. 418.
2. Actions to recover. *Crawford v. Rice & Hutchins Baltimore Co.*, 82 S. E. 273, 98 S. C. 121; *Daly v. Jefferson Hotel Co.*, 82 S. E. 412, 98 S. C. 222.

WAIVER.

1. An insurer, on receiving a statement of total loss from insured 20 days after a fire, by sending an investigator, who talked with insured about the fire and attempted to get him to sign a paper, but made no demand for further or more particular proof of loss, thereby waived any right to such further or particular proof of loss. *Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244.
2. In an action on an accident policy which the insurer claimed was void because the insured had other insurance in force, *held* that a verdict for plaintiff

would not be disturbed on appeal, where the evidence on the question of waiver by the insurer's agent was conflicting. *Wylie v. United States Health & Accident Ins. Co.*, 82 S. E. 402, 98 S. C. 273.

3. Defendant *held* to have waived any error respecting the calling of his case out of its order on the docket after the usual hour for adjournment on the last day of the term, where he agreed that the case should be marked as heard and referred to a referee. *Id.*, 82 S. E. 402, 98 S. C. 273.
4. Acts of a carrier in indorsing its freight bill with a notation of loss and in replying to the shipper's claim a year afterwards that on a reduction to invoice figures it would pay, *held* a waiver of a provision of that claim for loss should be made within four months. *Sauls-Baker Co. v. Atlantic Coast Line R. Co.*, 82 S. E. 418, 98 S. C. 300.
5. Of limitation in tickets. *Eberle v. So. Ry. Co.*, 79 S. E. 792, 98 S. C. 89.
6. Of limitation of time for presentation of claim. *Andrews v. A. C. L. R. Co.*, 82 S. E. 403, 98 S. C. 212.

WAREHOUSEMEN.

1. What a warehouseman chooses to do with his own property, or what risks he may assume in connection therewith, is not the test of his legal obligation to the property of the bailor. *Carolina Rice Co. v. West Point Mill Co.*, 82 S. E. 679, 98 S. C. 476.
2. Warehouseman *held* to have burden of proving that damage to goods did not result from his negligence, whether the bailment be for hire or gratuitous. *Carolina Rice Co. v. West Point Mill Co.*, 82 S. E. 679, 98 S. C. 476.
3. In action for damage to rice from a storm which flooded the warehouse in which it was stored, instruction *held* to make

- it sufficiently clear that, to be available as a defense, an act of God must be the entire cause of the loss. *Id.*, 82 S. E. 679, 98 S. C. 476.
4. Where a warehouseman admits the receipt of goods, and injury to them while in its custody, the burden of proof is on it to show that the injury occurred without negligence on its part, and it is error, in such case, to charge that the bailor cannot recover damages unless he prove negligence on the part of the warehouseman. *Id.*, 82 S. E. 679, 98 S. C. 476.
 5. Whether there is a difference between the terms "gross negligence" and "conscious failure to use due care" used as synonyms in a charge, will not be considered on appeal, whether the trial Court was not requested to differentiate between the two terms. *Id.*, 82 S. E. 679, 98 S. C. 476.
 6. A charge that "when the bailee or person in whose care the property is, has taken the same care of the bailed property as he did of his own, a presumption arises that he had exercised due care," held, erroneous, (a) presenting a false standard for the measurement of due care, and (b) instructing the jury what inference of fact should be drawn from the testimony with reference to the exercise of due care* by the defendant bailee. *Id.*, 82 S. E. 679, 98 S. C. 476.
 7. A charge, "that where a bailee provides a place for the storage of goods, safe from all but extraordinary events, he is not liable for damages directly resulting from storm, tidal wave or flood, such as had occurred but twice in a generation," is upon the facts, and erroneous. *Id.*, 82 S. E. 679, 98 S. C. 476.
- the latter may not sue to compel the company to grant the less rate. *Paris Mt. Water Co. v. Camperdown Mills*, 82 S. E. 417, 98 S. C. 304.
2. A water company furnishing water to a consumer pursuant to a contract fixing the price, but silent on the subject of interest, held not entitled to interest on water bills. *Id.*, 82 S. E. 417, 98 S. C. 304.

WILLS.

1. A devise of the balance of testatrix's estate to be used for keeping up certain graves at F. church, and also as an endowment fund for the benefit of such church, held operative as a charitable use. *Drennan v. Agurs*, 82 S. E. 622, 98 S. C. 891.

WILFULNESS.

See also Damages.

1. Though a tort-feasor is not conscious of an invasion of the rights of another, yet if a tort is committed in such a manner or under such circumstances that the jury may find that a person of ordinary reason and prudence would have been conscious of it as such, it warrants the infliction of punitive damages. *Eberle v. So. Ry. Co.*, 79 S. E. 792, 98 S. C. 89.
2. Want of wilfulness of carrier's agent selling a ticket containing a limitation which led the conductor to regard it as not good on the train in question, cannot, as regards punitive damages, negative the wilfulness of the conductor in ejecting the passenger without investigation of his reasonable explanation. *McKeown v. So. Ry. Co.*, 82 S. E. 437, 98 S. C. 388.

WITNESSES.

See Evidence.

- ### WATERS AND WATER-COURSES.
1. Where a water company is guilty of any illegal discrimination by charging certain consumers a less rate than others,

1. In a prosecution for assault and battery with intent to kill, where defendant testified in his own behalf, questions on cross-examination as to whether he

had previously been in similar difficulties, held inadmissible as exposing him to a criminal liability, or to some kind of punishment, or to a criminal charge. *State v. Knox*, 82 S. E. 278, 98 S. C. 114.

2. Where a defendant testifies in his own behalf, his character for veracity is thereby opened, and he may be cross-examined about any of his past transactions affecting his credibility; but his testimony in his own behalf does not open his general moral character. *Id.*, 82 S. E. 278, 98 S. C. 114.
3. In a prosecution for assault and battery with intent to kill, where defendant testified in his own behalf, questions on cross-examination whether he had been in similar difficulties before, and had cut a certain named person, did not tend to impeach his credibility, as distinguished from his general moral character, and hence were inadmissible. *Id.*
4. On a trial for murder, one jointly indicted with defendant, but not on trial, was a competent witness. *State v. Griffin*, 82 S. E. 254, 98 S. C. 105.
5. The trial Judge may, in his discretion, dispense with the requirements of rule 31, which provides that only one counsel on each side shall examine or

cross-examine a witness. *Barnett v. Gottlieb*, 82 S. E. 406, 98 S. C. 180.

WORK AND LABOR.

1. Compensation for. *See Champion v. Hermitage Cotton Mills*, 82 S. E. 672, 98 S. C. 418; *Crawford v. Rice & Hutchins Baltimore Co.*, 82 S. E. 273, 98 S. C. 121.
2. Where a servant hired from month to month breaches his contract of employment, leaving during the month, he cannot recover upon a *quantum meruit* for services rendered. *Daly v. Jefferson Hotel Co.*, 82 S. E. 412, 98 S. C. 222.
3. In an action by a servant for compensation for services rendered under a contract, which he breached, proof of the contract is not proof of the value of the services rendered which will support a recovery. *Daly v. Jefferson Hotel Co.*, 82 S. E. 412, 98 S. C. 222.

WORDS AND PHRASES.

1. "Resident." *Hayes v. Seaboard Air Line Ry.*, 81 S. E. 1102, 98 S. C. 6.
2. "Coroner's inquest." *State v. Griffin*, 82 S. E. 254, 98 S. C. 105.
3. "Proof of loss." *Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244.

32.2-101



